

# Plea Bargaining in the Military

## I. Introduction

Military plea bargains are distinctive. They follow a relatively formal process and are tailored for the special features of the military justice system. Furthermore, a military plea bargain that includes a sentencing agreement offers the military defendant a remarkable opportunity for leniency and protection against severity.

With an estimated 90 percent of courts-martial resulting in guilty pleas, plea bargaining procedures primarily in the form of pretrial agreements are critical to the fair administration of military justice and essential to the overall court-martial process.

Pretrial negotiations for criminal cases in the military are largely similar to those in the civilian sector. The government and defense counsel negotiate the terms of an agreement that result in the defendant (civilian) or accused (military) pleading guilty in exchange for a limitation on the maximum amount of confinement the defendant/accused will serve in prison. This negotiation for a limitation on confinement, however, is where the processes diverge. The primary difference between plea bargaining in the military and plea bargaining in the civilian sector is that, although lawyers are intimately involved in the process, the final agreement in the military sector is between a commander and a soldier. As subject matter experts on criminal law, military lawyers, and civilian defense counsel that practice in the court-martial system, must understand the rules for plea bargaining in the military.

This article will examine the plea procedures process from the time an accused soldier makes the decision to plead guilty through the acceptance of that plea by the court. In the vast majority of guilty pleas, the process is facilitated through plea negotiations and successful completion of a pretrial agreement. This article will also discuss an alternate administrative disposition available in the military, which provides for an administrative discharge in lieu of trial by court-martial. After providing a general overview of the military's plea bargaining procedures by way of a hypothetical example, this article will examine four primary areas: (who) the parties to a pretrial agreement; (why) the reasons a pretrial agreement may be beneficial to those parties; (what) the permissible components of a pretrial agreement; and (when) the timing and mechanics of the plea bargaining process.

## II. Plea Procedures in General

As commonly depicted in any TV show or movie about a criminal case, the negotiations for a civilian criminal

defendant to plead guilty in exchange for a limit on confinement take place between the prosecutor representing the government and the defense counsel representing the defendant. Although a military prosecutor (trial counsel) and defense counsel will conduct the actual face-to-face negotiations in a court-martial, the military is unique in that the actual pretrial agreement is between the convening authority (a commander) and the accused soldier who, in the vast majority of cases, will never meet. Thus, the military combines the common civilian practice of negotiation between a prosecutor and defense counsel with a unique binding agreement between the actual parties to the deal, the convening authority and the accused. Through a hypothetical case, what follows is a brief summary of the process *after* a soldier has been accused of, and charged with, committing a criminal offense that is a violation of the Uniform Code of Military Justice (UCMJ).<sup>1</sup>

### A. The Charges and Initial Meeting with Trial Defense Counsel

A commander has brought or preferred charges<sup>2</sup> on a soldier, a Private First Class (PFC, E-3)<sup>3</sup>, in his company and recommended a general court-martial.<sup>4</sup> The soldier has been charged with being absent without leave (AWOL) for 25 days (Charge I, a violation of UCMJ Article 86, AWOL) and larceny of his roommate's \$1000 computer from their barrack's room (Charge II, a violation of UCMJ Article 121, Larceny of nonmilitary property over \$500).<sup>5</sup> After being ordered into pretrial confinement,<sup>6</sup> the soldier is escorted to Trial Defense Services (TDS) to see a military defense counsel.<sup>7</sup> The facts are undisputed and the soldier has no defense to either charge—he admits he stole his roommate's computer, pawned it for money, and went AWOL to be with his girlfriend. After explaining this to his defense counsel, the soldier wants to know his options. More precisely, the soldier wants to know: how much time will I spend in jail, and will I get kicked out of the military?

Because the soldier's version of events is consistent with all of the statements and evidence in the preferral packet (including evidence of a prior five-day AWOL and shoplifting offense that were already disposed of through nonjudicial punishment<sup>8</sup> and not included in the current court-martial charges<sup>9</sup>), the defense counsel explains to the soldier that while they will explore the possibilities of an administrative discharge,<sup>10</sup> based on the offenses, the best option is to seek a pretrial agreement.



**JEFF A. BOVARNICK\***

Colonel, U.S. Army,  
Judge Advocate  
General's Corps

*Federal Sentencing Reporter*, Vol. 27, No. 2, pp. 95–107, ISSN 1053-9867, electronic ISSN 1533-8363.  
© 2015 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2014.27.2.95.

Although no defense counsel can guarantee a client a specific result, in the scenario presented, the defense counsel can certainly make an educated guess based on her experience at the installation. She informs her client that the maximum punishment for his offenses is reduction to Private E-1, forfeiture of all pay and allowances, five years and six months confinement,<sup>11</sup> and a Dishonorable Discharge (DD). The defense counsel goes on to cautiously explain that based on her experience and educated judgment, she does not believe her client will get anywhere close to the maximum punishment with respect to confinement and, in her opinion, it is incredibly unlikely he will get a Dishonorable Discharge for these offenses.<sup>12</sup> She lets her client know that, in her opinion, the recommendation for a general court-martial for these particular offenses appears to be high, and she believes this case is more worthy of a special court-martial, which automatically caps the confinement at one year and limits the discharge to a bad-conduct discharge.<sup>13</sup>

Yet, despite her educated opinion on the matter, the defense counsel knows it is her obligation to remind her client of his present situation: he is in pretrial confinement; charges have been preferred; and the commander has recommended a general court-martial, which means that after the case is forwarded from the company commander to the battalion commander and brigade commander, it is very likely the brigade commander, in his capacity as a special court-martial convening authority, will appoint an Article 32b investigating officer, which is a prerequisite to bringing a general court-martial.<sup>14</sup> If everything goes according to the government's current plan, the case could get referred to a general court-martial. The defense counsel informs her client that if he is willing to plead guilty, he should authorize her to negotiate with the government early on, even before the Article 32b investigation, to see what type of deal the government is willing to make.<sup>15</sup>

While the soldier would love to return to his unit and regain the trust of his squad, he also realizes that it is very difficult to overcome the fact that he will be thought of as a "barracks thief." He knows that after his prior minor offenses and nonjudicial punishment, his squad leader counseled him orally and in writing,<sup>16</sup> and they discussed the potential for an administrative separation if he did not turn it around. After a lengthy discussion with his defense counsel, the soldier now realizes that based on his crimes, his career in the military is essentially over. The soldier's primary concern is limiting his jail time and potentially the type of discharge. He authorizes his defense counsel to explore these options with the government.

## B. The Negotiations

**An overview.** Before breaking down the negotiations process, a general overview of the process and its ultimate result is warranted. There is a science and an art to plea procedures in the military. Even as pretrial agreements are structured and governed by rules (the science), plea negotiations by their nature must remain fluid (the art). In plea

negotiations, opposing sides explore their adversary's strengths and weaknesses, and engage in a give and take to secure an agreement that meets the ends of justice for the government (and victim) and for the accused. Once an agreement is reached, military rules require it to be reduced to writing with no provisions left outside the signed agreement. Pursuant to the agreement, the accused then pleads guilty before the court. The military judge reviews the agreement with the parties and discusses it in detail with the accused to ensure it was voluntarily and willingly entered into by the accused. If the provisions of the agreement survive scrutiny by the court, and the accused convinces the military judge he is pleading guilty because he is in fact guilty, then the court accepts both the pretrial agreement and the plea. The following sections review each part of the process in more detail.

**The Parties.** As stated above, the actual negotiations for any pretrial agreement in the military are between the accused soldier and the convening authority. There are three levels of convening authorities in the military: the summary court-martial convening authority (SCMCA), the special court-martial convening authority (SPCMCA), and the general court-martial convening authority (GCMCA), each designated by the level of court they are authorized to convene.<sup>17</sup> One of the primary factors distinguishing each level of court is the maximum punishment authorized at each court-martial.<sup>18</sup> In practice, the convening authority and soldier do not meet to negotiate the terms of an agreement. The negotiations are left to the unit trial counsel (prosecutor) as the government's representative and the defense counsel on behalf of the accused soldier.

Although it may appear to be self-evident, it is critical to note that in the military, there is a clear separation between the trial counsel and defense counsel and their respective military chains of command. Normally, in the Army, both the trial counsel and defense counsel are Captains or Majors. Trial Defense Service (TDS) is a separate and distinct unit, and no defense counsel in TDS is supervised or in any way rated by the government chain of command. TDS counsel must act in the best interest of their client, subject of course to ethical rules, the rules of court, and the UCMJ in general. On the government side, there is a chain of command. Interestingly, a unit trial counsel has a number of bosses. For purposes of processing a court-martial, a trial counsel assigned to a brigade must work with his or her immediate supervisor (normally a Major who is the Brigade Judge Advocate) and the Chief of Military Justice (normally a Major who works at the installation Criminal Law office). A court-martial is processed up through the chain of command, meaning the commanders at each level as described above. After the entire chain of command makes recommendations up through the brigade commander (SPCMCA), the case is handed off to the Chief of Military Justice at the installation level. Ultimately, after review by the Chief of Military Justice and the Deputy Staff Judge Advocate (usually a lieutenant colonel), the case is

passed to the Staff Judge Advocate (SJA) (usually a colonel) for final review before it is brought to the GCMCA. Under the *Manual for Courts-Martial (MCM)*, the SJA has a statutory obligation to provide legal advice to the GCMCA on all aspects of the court-martial, to include the nature of the charges, the level of disposition, and any pretrial agreements.<sup>19</sup>

**The Process.** Following our hypothetical case from above, the soldier's defense counsel has been authorized by her client to explore a pretrial agreement with the government. What does this mean in practice? What can actually be negotiated? What does the accused soldier give up in exchange for pleading guilty? What can the soldier hope to gain? What is the defense's bargaining power, or conversely, what benefit will the government receive? What are the potential levels of disposition?

**The Government's Incentives to Plea Bargain.** As an initial matter, it is important to understand the government's general incentive to negotiate in courts-martial. In the example given, it may not appear the government has much incentive to negotiate a plea bargain. The government appears to have all of the evidence in the form of witness statements and other documentary evidence. Even without a lawfully obtained confession, it appears an apt trial counsel should be fully capable of marshalling the evidence to present to the trier of fact, prove the government's case beyond a reasonable doubt, and secure a conviction, should the accused plead not guilty. Yet, is it prudent for the government to take the position that they will not plea bargain? A blanket policy of refusing to negotiate with the defense is not conducive, and is in fact, counterproductive to the practice of criminal law in the military.

Pretrial negotiations are ultimately specific to each individual case, but there are general incentives for the government to enter negotiations for a pretrial agreement. One overarching reason is the fair and efficient administration of justice. More tangibly, the factors for the government's consideration are the time and expense of a contested court-martial. If the government can secure a conviction through a guilty plea, there is a definitive savings in the time and expense of a fully contested case.

Although the amount of time expended by the individual government trial counsel or a court reporter (those personnel who work within the system) may not necessarily be a major factor in the plea-negotiation process, certainly the time required by other "outside" members of the court-martial process are a factor: the witnesses, bailiffs, escorts, and most importantly the panel members.

The panel members are selected by the GCMCA. Although the subject of panel selection is beyond the scope of this piece, the selection process and the service of those selected members are an absolutely essential and critical part of the court-martial process. When an accused soldier requests a panel trial, there is no more important duty for a court member than service on the court-martial panel. In

a busy court-martial jurisdiction, panel members could sit for trials multiple times per month, taking them away from their normal duties and responsibilities.

Other aspects of time include the length of time it takes to get a fully contested case to trial and the length of the actual court-martial itself. In busy courts-martial jurisdictions, the efficiency of the docket can be a factor in negotiations. Most, if not all parties to the court-martial process prefer a timely resolution of the case. When a case drags on for months with numerous delays, negative perceptions arise. With few exceptions, fully contested courts-martial with panel members take longer to get to trial and, once started, take much longer to complete than guilty pleas.

In general, fully contested trials have more sessions with motions and more issues with discovery, witness production, and the actual scheduling of the case on the docket due to availability of counsel and witnesses. Because contested trials are usually docketed for multiple days, finding space on a busy docket also becomes a factor. All of these factors lead to the conclusion that a judge-alone guilty plea is more efficient than a contested panel case.

Another unique aspect of court-martial practice is the GCMCA's requirement to fund the entire court-martial, and the expense may be a factor for some GCMCAs. For example, in a contested court-martial, the GCMCA generally has to fund all witness travel for government and defense witnesses, including all expert witnesses and their fees.<sup>20</sup> Needless to say, this can reach thousands, if not tens of thousands of dollars for a single court-martial.

In short, the time and expense of a contested trial are factors considered by the government in plea negotiations. Understanding the accused's incentive to bargain for a reduced sentence and the government's threshold incentives of saving time and money, we can turn the negotiation process itself.

**Who can start the negotiation process?** Numerous parties can start the negotiations process,<sup>21</sup> but in practice, if the government has presented the defense with a preferral packet that contains all of the evidence indicating guilt, generally the defense counsel approaches the trial counsel to explore options. There are certainly occasions when the government approaches the defense to see if there is interest in plea bargaining, but for purposes of explaining the process, using the hypothetical presented, the defense counsel approaches the trial to explore options.

**What are the options? What can be bargained for?** Seeking the best possible disposition for her client, the defense counsel will first explore the possibility of a discharge in lieu of trial by court-martial. In the Army, this is generally referred to as a "Chapter 10" governed by Army Regulation 635-200. Each service has functional equivalent. Under these administrative provisions, a soldier who has committed an offense under the UCMJ and MCM that includes a punitive discharge (a bad-conduct or dishonorable discharge) may voluntarily submit a request for discharge in

lieu of court-martial. In essence, this means the soldier will be separated from the service without a punitive discharge, but rather with an administrative discharge. Perhaps more importantly, the soldier also avoids a conviction.

As mentioned above, at a court-martial, a soldier can only receive a punitive discharge or no discharge at all. A court-martial cannot adjudge an administrative discharge. From best to worst, administrative discharges include: an Honorable Discharge; a General Discharge under Honorable Conditions (generally referred to as a General Discharge); and a General Discharge under Other Than Honorable Conditions (generally referred to as an OTH or UOTH Discharge). Because of the stigma of a punitive discharge, there is a strong incentive for a soldier to bargain for an administrative discharge. In the Chapter 10 process where the soldier seeks a discharge in lieu of trial by court-martial, normally the soldier receives an OTH.<sup>22</sup>

If a Chapter 10 is accepted by the convening authority, the charges are dismissed. When it is appropriate for the defense to submit a Chapter 10 and when it is appropriate for the convening authority to accept a Chapter 10 is truly a determination that must be made on a case-by-case basis considering all of the factors involved in that particular case, such as the nature of the offenses, the status of the victim (if there is one),<sup>23</sup> or any mitigation for the accused. A myriad of other factors may be considered by any particular commander for any particular case. In practice, there is no set rule for when government counsel should advise a commander to recommend or approve a discharge in lieu of trial court-martial, but the soldier's request must be forwarded to the GCMCA and accompanied by all documentation and informed advice from the Staff Judge Advocate.<sup>24</sup>

In the hypothetical above, the defense counsel submitted a request for discharge in lieu of trial by court-martial, it was forwarded to the GCMCA with recommendations for disapproval from the entire chain of command and SJA, and the GCMCA did in fact disapprove the request.

**The "Super Charge."** Not to be deterred, the defense is now seeking another form of disposition to avoid a conviction at a general or special court-martial and to avoid a punitive discharge. She discusses with the trial counsel an option that has her client pleading guilty at a summary court-martial, accompanied by her client's promise to waive his right to appear at an administrative separation board pursuant to AR 635-200, Chapter 14, and agreement not to contest the issuance of an OTH discharge.<sup>25</sup> In the author's experience and although not written anywhere as a specified process, in some Army jurisdictions, such an offer is commonly referred to as a "Super Charge." Here, by pleading guilty at a summary court-martial, the accused's confinement is limited to a maximum of 30 days in jail and he cannot get a punitive discharge. Considering the maximum he is facing at a general court-martial (66 months in jail and a Dishonorable Discharge), this would be an incredible deal for the defense. From the government's

perspective, a Super Charge deal could be inviting under certain circumstances. There are two particularly attractive reasons for commanders in busy criminal jurisdictions with backed up dockets: It provides both for the swift administration of justice and for deterrence. Other soldiers in the unit will see the soldier depart for jail<sup>26</sup> in a matter of days rather than months, and the soldier who committed the offense is still separated from the military pursuant to the agreement.<sup>27</sup>

Back to the hypothetical. In practice, the negotiation for this Super Charge deal can take one of two forms. It could be reduced to writing and formally rejected by the convening authority, or it could be explored orally between counsel. Which method is used is certainly part of the art of negotiations determined by, and dependent on, the working relationship between counsel at each installation. Because this offer to plead guilty at a summary court-martial does not have to be initially approved by the GCMCA, there is no requirement for it to be forwarded to the GCMCA.<sup>28</sup> In the negotiations, it may or may not be beneficial for the defense to seek the "support" of the trial counsel. It should be assumed that the SCMCA will seek the advice of trial counsel prior to taking action on an offer to plead guilty at a summary court-martial. In theory, if the trial counsel supports the offer, presumably that advice will be heeded by the SCMCA—but it is only advice, and the SCMCA can follow or disregard it. Also, it follows that the trial counsel may recommend disapproval, but the defense counsel may seek an audience with the SCMCA and convince the commander to accept the deal. If, through oral discussions, the defense counsel gets a sense there is no support for the Super Charge deal, then it is not required that the proposal be reduced to writing.

**Dealing for the Level of Disposition (the Bad-Conduct Discharge Referral).** In the current case, the offer to plead guilty at a summary court-martial is not supported by the trial counsel, but more importantly, the offer is rejected by the SCMCA (battalion commander). At this stage, what this means is the case is now moving to the SPCMCA (or brigade commander) level.

The defense counsel now turns her energy to the essential negotiations in this case. As noted above, in her educated opinion based on experience in the jurisdiction, the defense counsel is aware of similar cases (AWOL and larceny) that were referred to special courts-martial empowered to adjudge bad-conduct discharges (commonly referred to as "BCD Specials," as compared to typical or "straight" special courts-martial that cannot authorize a punitive discharge).<sup>29</sup> This may be a shrewd tactic, as defense counsel can limit her client's exposure to a maximum of one year in jail and a bad-conduct discharge (as compared to a maximum of 66 months confinement and a Dishonorable Discharge).

For obvious reasons, this outcome is extremely attractive and beneficial to the defense, but perhaps not so for the government. At this point, it is appropriate to discuss the

government's incentive to negotiate and the potential result sought by the government. Just as no defense counsel can guarantee a particular outcome to their client, it is equally true that no government counsel or SJA can guarantee any outcome to a convening authority. Other articles in this pair of Special Issues are devoted to sentencing, but the concept is worth mentioning here in the context of plea negotiations. The government counsel must remain open-minded through the negotiations process and heed the adage that past results are not guarantees of future results. Certainly, though, as the defense counsel based her advice on past experience, so too the government counsel should and must consider the results in similar cases. Preferably those results are close in time (i.e., under the same military judge) for essentially the same type of offenses. Because every case is truly unique (even cases with co-conspirators with the exact same charged offenses will have differing mitigation cases), the government can only make an educated guess about the value of a case. By "value," the government usually looks to two primary elements in sentencing: the amount of confinement and the type of punitive discharge.

Exploring this concept further, when the government considers the type of punitive discharge, whether a bad-conduct discharge or a dishonorable discharge, the primary factor for consideration is generally the nature of the offense and whether there is a victim. We will assume the government counsel would not argue for a dishonorable discharge in sentencing, even if the case were referred to a general court-martial. The reason, in this example, is that this particular criminal jurisdiction has a number of heinous crimes pending with emotionally and physically scarred victims. Understanding the environment he is practicing in, the trial counsel, by comparison to these other pending cases, believes that it would not be prudent to argue for a dishonorable discharge in a larceny/AWOL case. More importantly, the government counsel realizes that arguing for a DD in this case would alienate the sentencing authority and lose credibility in this case and future cases. The bottom line is that arguing numerous cases before the same sentencing authority matters.

**Dealing for Confinement.** That leaves the issue of the amount of confinement the government assesses as fair in this case. Once again, this is an art, not a science. A series of progressively more experienced prosecutors—the trial counsel, the Chief of Military Justice, the Deputy Staff Judge Advocate, and ultimately the Staff Judge Advocate—engage in a collaborative effort to determine the most informed and sound advice to provide to the convening authority.

What are the factors that weigh in the government's decision on a reasonable amount of time to recommend to the convening authority?

First, it is the SJA's knowledge and experience based on prior cases brought to the convening authority. This cannot be overstated, as the pretrial agreement is between the soldier and convening authority. If the SJA and, by extension, those members of the military justice section have no

sense of the convening authority's limits, then plea negotiations in any jurisdiction could quickly turn for the worse. For example, the government counsel gives assurances to the defense that there is support for the agreement, but there is not support at the higher level, then trust within the system is eroded. In general, SJAs will provide their counsel guidance for the plea negotiations process.

Using the current hypothetical as an example, let's say the government wants to hold out for four years (or 48 months) confinement (reducing the maximum by 18 months from 66 months). Is 48 months of confinement still considered unrealistic in plea negotiations for this case? One may suggest that there is minimal incentive for the defense to enter a pretrial agreement. The defense may garner a better sentence in terms of less confinement by pleading guilty without the benefit of a pretrial agreement. Or, the defense may decide to require the government to prove their case beyond a reasonable doubt and request a panel for the case. With the discussion of the government's incentives to negotiate above (saving the time and expense of a contested case), does a decrease of 18 months provide any real incentive in this particular case? These considerations will be discussed in more detail below.

In the example given, is there some amount of confinement more than one year and less than four years that will be considered more realistic to bridge any gap between the party's expectations? The answer is not really. In this scenario, although reasonable minds may differ, perhaps a number around two years would be a starting point for negotiations by the government. The understanding would be that this is the starting point and that it leaves room in the negotiation process for a lower number.

Why wouldn't the government start with one year of confinement or less? In this example, the government counsel and company commander initially recommended a general court-martial. If the case was initially valued at a year or less, then the initial recommendation for the level of court would have been a BCD Special, which is capped at one year confinement. Whether by design for negotiating purposes or otherwise, the initial recommendation was for a general court-martial, so for consistency, at least initially in the negotiations, the government's starting point should be some amount of confinement more than a year.

To review, at this point in the initial stages of the negotiations, on behalf of her client, the defense counsel is seeking referral to a BCD special court-martial in exchange for her client's guilty plea thereby limiting his maximum punishment to one year confinement and a bad-conduct discharge (and reduction to E-1 and forfeiture of two-thirds pay per month for 12 months). By contrast the government will likely give up on the dishonorable discharge, but initially believes two years is a fair limit on the confinement.

**What other provisions can be bargained for?** As discussed above, if the government enters a pretrial agreement, a prime consideration is moving the case efficiently through the process. Common elements to be considered

here include requiring the accused to waive his Article 32b pretrial investigation (if the case were to be referred to a general court-martial); to be tried before a military judge alone; to limit out-of-state witness production in sentencing; to go to trial at the first available date on the docket; to waive certain motions;<sup>30</sup> and (in the current example) potentially to pay restitution to his old roommate for the stolen and pawned computer.

As the trial and defense counsel go back and forth, each gets a sense of the other's limits. Throughout the process, the defense counsel is communicating with her client to let him know the government's proposed limit. At the same time, the trial counsel is communicating with his Chief of Military Justice, who in turn is keeping the SJA informed of the status of the negotiations.

Ultimately, for the government, an assessment is made that the SJA will support no less than 18 months, meaning the SJA will advise the GCMCA to reject any offer to plead guilty pursuant to a pretrial agreement that includes a provision for less than 18 months confinement. The GCMCA is, of course, free to disregard such advice.

Although the government has communicated its position that 18 months confinement is their lowest, fair and reasonable offer, through cordial and transparent negotiations, the defense counsel informs the trial counsel that her client will submit a pretrial agreement that, among other provisions described below, will include a request for referral to a BCD Special (in essence limiting confinement to one year). With that, we will now explore the provisions of Rule for Courts-Martial (RCM) 705 for Pretrial Agreements, including the concept of counteroffers.

### III. Pretrial Agreements and Sentencing

To best illustrate pretrial agreements pursuant to RCM 705, it is instructive to continue with the scenario.

Having determined that a referral to a BCD Special court-martial is a fair deal for her client, the defense counsel drafts a pretrial agreement and meets with her client to explain it in detail and advise him that signing it is in his best interest. To be sure, the defense counsel will constantly remind the accused that his act of signing the agreement must be 100 percent voluntary.

The document containing the pretrial agreement is broken into two distinct parts for very specific reasons, as described below: Part I is called the "Offer to Plead Guilty" and Part II is called the "Quantum Portion." Each part is signed by the defense counsel, the accused soldier, and the convening authority (in this case, the GCMCA). The Offer to Plead Guilty contains numerous provisions that the accused agrees to do—primarily, plead guilty to one or more of the charges—in exchange for the convening authority taking the action specified in the Quantum Portion, usually in the form of limiting the sentence. To take it one step further: in the vast majority of cases, this limitation in the sentence is usually a specified limit on the duration of confinement, and a limitation on the type of punitive discharge.

Specifically, RCM 705 states that the pretrial agreement may include:

- (1) A promise by the accused to plead 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 and which are not prohibited by 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.<sup>31</sup>

The key to subparagraph (E) comes in the discussion of the rule, which provides an example to highlight the point made above:

For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.<sup>32</sup>

As for terms and conditions, RCM 705 provides that those terms in a pretrial agreement that are not voluntary or deprive the accused of certain rights are not enforceable. Not only must the accused enter the agreement freely and voluntarily, but:

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, [and] the complete and effective exercise of post-trial and appellate rights.<sup>33</sup>

Numerous terms and conditions are permissible, such as a promise to enter into a stipulation of fact concerning the offenses to which the accused is pleading guilty,<sup>34</sup> a promise to testify as a witness in another court-martial,<sup>35</sup> a promise to provide restitution,<sup>36</sup> a promise to conform conduct to certain conditions,<sup>37</sup> and most commonly, promises to waive certain procedural provisions such as the Article 32 investigation, a trial by members or judge alone, or the production of witnesses.<sup>38</sup>

In the scenario, the process of negotiation has been described and we are at the point of formal submission, which is governed by RCM 705(d)(2). After negotiation, "if the accused elects to propose a pretrial agreement, the defense counsel shall submit a written offer. All terms,

conditions, and promises between parties shall be written.” *Sub rosa* or secret, unwritten agreements are prohibited. Although not called the “Quantum Portion” in the rule, the rule does specify that any statement of specified action on the adjudged sentenced must be set forth on a separate page.

Why is the quantum portion set forth on a separate page?

The essence—perhaps the uniqueness—of a pretrial agreement in the military is that the accused gets the *lower* of the two sentences, the one announced by the court or the one contained in the pretrial agreement. Also, it is important to note that the sentencing authority never sees the quantum portion prior to announcing the sentence. The sentencing authority (usually a military judge in a guilty plea) absolutely knows there is an agreement to limit the adjudged sentence, however, the sentencing authority has no idea what that sentence limitation is. The chart illustrates the operational effect of a sentence limitation on confinement in a pretrial agreement:

<b>Quantum Portion</b> <i>(confinement limitation agreed on by the accused and the GCMCA)</i>	15 months	15 months
<b>Confinement announced by the court</b> <i>(without prior knowledge of the amount in the quantum portion)</i>	20 months	12 months
<b>Maximum confinement that can be approved by GCMCA [a]</b>	15 months	12 months
<b>Result</b>	<b>5-month benefit:</b> The court said 20 months, but the GCMCA must reduce confinement to 15 months.	<b>The accused “beat the deal” by 3 months:</b> Even though he bargained for 15 months, he only serves 12 months.

[a] This does not account for the fact that the GCMCA can grant clemency and further reduce the sentence to confinement (and other elements of the sentence).

The accused receives the shorter sentence—either the amount of time announced by the court or the amount contained in the pretrial agreement. The convening authority cannot increase the amount of confinement adjudged by the court and, pursuant to the pretrial agreement, is required to reduce the confinement to the amount specified if it is less than the amount announced by the court.

Regardless, from the perspective of the accused, one could characterize the results in this military plea bargain process as a small victory.

Consider an accused in the first example in the chart (and assume the maximum punishment is 60 months

confinement). He has bargained for a maximum of 15 months of a potential 60 months. Without a pretrial agreement, he would be serving 20 months. Certainly saving 5 months confinement was worth the deal.

Now, consider the accused in the second example in the chart. He believed 15 months was a fair assessment and in the general sense, was willing to serve 15 months when he signed the deal. Now, he has to serve only 12 months after “beating the deal” by three months.

#### A. Counteroffers

In our hypothetical, when the defense counsel and trial counsel are negotiating back and forth, they engage in making proposals and counterproposals. These are not considered offers and counteroffers as described in the rule. In the normal course of events, after the defense counsel and accused have signed both the offer to plead guilty and the quantum portion, the actual pretrial agreement is submitted through the trial counsel to the Chief of Military Justice.

Although recommendations from the chain of command below the GCMCA level are prudent, they are not required on a pretrial agreement. By comparison, government counsel do have obligations to consult victims, or their families, and get their recommendations in certain types of cases. Armed with all of the relevant information, the SJA then takes the pretrial agreement to the GCMCA for action. The convening authority may accept or reject the accused’s offer to plead guilty, or may propose a counteroffer of any terms not prohibited by law.<sup>39</sup>

In the original scenario, the defense counsel has submitted a pretrial agreement for her client, who has offered to plead guilty to both the larceny and AWOL charges, to be tried by a military judge alone, to waive production of all out-of-state witnesses, and to go to trial at the first open date on the docket, in exchange for the convening authority’s promise to refer the case to a BCD Special court-martial. Although not explicitly stated in this offer, by statute, as described above, the discharge and confinement are capped at a bad-conduct discharge and 12 months confinement.

In the specific hypothetical, the SJA advises the GCMCA on a potential counteroffer. The SJA explains to the GCMCA that the original negotiations bogged down at 18 months, that the accused has not made restitution to his roommate, and the chances of him doing so based on his dire financial straits are slim at best. Thus, the SJA suggests a counteroffer of 15 months confinement, no dishonorable discharge, a waiver of the Article 32, but no provision for restitution.<sup>40</sup> The GCMCA completes this counteroffer by rejecting the original offer in the space provided on the agreement and writes “see counteroffer,” which will be written on the quantum portion. On the quantum, the proposed counteroffer is written in and signed by the GCMCA.

The pretrial agreement is then submitted back to the defense counsel for further consultation with her client. The client now has the option to accept the counteroffer or

reject it. If he rejects it the counteroffer, the case will proceed to an Article 32b pretrial investigation. The case would not return to the GCMCA until after completion of the Article 32 (assuming the investigating officer, SPCMCA, and SJA all recommended going forward to a general court-martial). If the accused accepts the counteroffer, he must also sign a waiver of the Article 32. The documents will then go back through the SJA to the GCMCA, so the case can be referred to a general court-martial.

### **B. Withdrawal**

The accused may withdraw from a pretrial agreement at any time; however, the accused may only withdraw from a plea pursuant to pretrial agreement in certain circumstances.<sup>41</sup> These circumstances include disagreement over the stipulation of fact<sup>42</sup> or after entry of the plea but before the sentence is announced if the accused requests to withdraw<sup>43</sup> or the judge finds that the accused made statements inconsistent with the plea during the inquiry.<sup>44</sup>

### **C. The 2014 National Defense Authorization Act and Sexual Assault Cases**

In December 2013, the President signed into law the 2014 National Defense Authorization Act<sup>45</sup> (NDAA), which included numerous changes to the UCMJ with respect to sexual assault cases and victims' rights. For purposes of this chapter, it is worth noting that changes to two sections, UCMJ Article 32 (effective in January 2015) and UCMJ Article 60 (effective in June 2014), may impact the subject of pretrial agreements in sexual assault cases.

As we have seen, the waiver of an Article 32 pretrial investigation prior to referral to a general court-martial is an acceptable provision in a pretrial agreement. With the new law's addition of victims' rights and their increased involvement in the pretrial process, the waiver of the Article 32, essentially a preliminary hearing, may become less of a factor in the pretrial negotiation process.

Under the old UCMJ Article 60(c), the ability to "modify the findings and sentence of a court-martial" was a matter of command prerogative within the sole discretion of the convening authority. Essentially, this meant that the convening authority could dismiss a charge or reduce a sentence adjudged by the court. Under the new UCMJ Article 60(c), the convening authority now has restrictions in sexual assault cases and other serious offenses.

Although numerous restrictions are placed on the convening authority, as well as exceptions to those restrictions, the primary restriction is that the convening authority can no longer disapprove a finding of guilty unless it is for a "qualifying offense." Rather than describe the rules for "qualifying offenses," it is sufficient to state that sexual assault offenses are never qualifying offenses, therefore the convening authority can never disapprove a finding of guilty for a sexual assault offense. Nor can the convening authority reduce an adjudged sentence following a sexual assault conviction.<sup>46</sup>

Of the three exceptions to the Article 60(c) restrictions, the third specifically references pretrial agreements. "If a pretrial agreement has been entered into by the convening authority and the accused, [the convening authority can] approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pretrial agreement."<sup>47</sup> Yet, even this exception has its limitations regarding offenses with mandatory minimum sentences. For example, if an accused is convicted of an offense that carries a mandatory minimum sentence of a dishonorable discharge, there can be a provision in the pretrial agreement to reduce that dishonorable discharge to a bad-conduct discharge.<sup>48</sup>

As the new laws enacted by the 2014 NDAA come into effect, practitioners will have to assess their impact on the plea bargaining process and become intimately familiar with the restrictions on the convening authority in posttrial process.

This final section examines the guilty plea inquiry, which is the process by which the military judge reviews the accused's plea of guilty and the contents of the pretrial agreement.

### **IV. The Guilty Plea Inquiry**

Before discussing the guilty plea inquiry itself, two additional concepts that factor into the form of the inquiry are worth noting: the "naked" plea and the Stipulation of Fact.

#### **A. The "Naked" Plea**

This odd term does not appear in the *Manual for Courts-Martial* or *Military Judge's Benchbook*, yet it is part of the military justice practitioner's lexicon. In essence, this is a guilty plea entered by the accused without the benefit, or safety net, of a pretrial agreement. Thus, the accused is pleading naked, with no protection. Yet, perhaps this strategy is calculated and not as risky as it seems.

Usually the result of failed negotiations, the accused decides it is in his or her interest to simply plead guilty to one or more offenses without the protection of a sentence limitation provided by a pretrial agreement. As we shall see in the guilty plea inquiry with the military judge, the accused still engages in a detailed dialogue with the military judge to determine that the plea is being entered voluntarily and with full knowledge of its consequences and effect. The primary consequence is, of course, that based upon the guilty plea, the accused can be sentenced to the maximum punishment authorized by law (for example, in our hypothetical, that maximum is reduction to Private E-1, forfeiture of all pay and allowances, 66 months confinement, and a dishonorable discharge). There is no chart like the one that appears above demonstrating how the accused could potentially benefit from a pretrial agreement—whatever sentence is announced in court is the sentence.

Why might an accused plead "naked"? Whether plea negotiations have broken down or not, this risky endeavor is generally a calculated strategy by the defense. The defense has numerous factors to consider, including: the

nature of the offenses, the status of any victim, any remorse demonstrated by the accused, other mitigation presented by the accused, and the knowledge of the sentencing authority's tendencies in similar cases. If these factors all appear to favor the accused's sentencing case, the naked plea is one strong additional factor that allows the defense to argue that the accused has taken full responsibility for his actions and, on his own (without any promised benefit from the government), has saved the government the time and expense of a trial. Regardless of any defense argument, the military judge will favorably consider such a plea and give credit for it. The difficulty comes in measuring how much "extra credit" or reduced confinement the military judge gave as a result of the naked plea vs. a plea pursuant to a pretrial agreement.

To be clear, as described by the military judge when addressing a panel in the sentencing phase, "a plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government usually are saved by a plea of guilty. Such a plea may be the first step towards rehabilitation."<sup>49</sup>

### **B. The Stipulation of Fact**

In a guilty plea, aside from the pretrial agreement itself, this document is arguably the most crucial to the plea process. To not overstate the matter, an efficient, streamlined guilty plea may only contain a few documents or exhibits to begin with, yet the contents of the stipulation of fact, when utilized properly, can be a powerful tool for both parties and potentially impact the case beyond the guilty plea itself.

As stated earlier, RCM 705 recognizes the stipulation of fact is a valid provision in a pretrial agreement. In essentially all cases with a pretrial agreement, the government requires the accused to sign a written stipulation of fact. As we shall see, the military judge will cover in detail the nature and uses of the stipulation of fact with the accused. In short, the stipulation of fact becomes the uncontradicted facts in the case, and it can be used to determine if the accused is in fact guilty, and if so, it can be used in determining an appropriate sentence for the accused.

Although the nature and uses of a stipulation of fact may be the science, in this author's opinion, the drafting of the stipulation of fact in the first place is an art. There are different philosophies on who drafts the stipulation, when it must be signed, and what contents are included. In the vast majority of situations, the trial counsel should draft the initial version of the stipulation and submit it to the defense counsel to discuss, review, and revise with the client. Yet, it is not unheard of for a defense counsel to draft the initial version of the stipulation. Although not required by the rule, many military justice sections use a best practice of requiring the stipulation of fact to be completed and signed by the defense counsel and accused, and submitted with the offer to plead guilty to the SJA to bring to the GCMCA for approval.

The contents of the stipulation of fact are vital and again reflect the art of this process. First, this philosophy is driven by the SJA and the Chief of Military Justice, and adopted by the trial counsel. Stipulations of fact can be short, bare-bones documents containing the minimum required: a statement of the facts and admission to each element of the offenses to which the accused is pleading guilty. Such a stipulation could be reduced to a couple of pages. On the other end of the spectrum, a stipulation of fact can be a lengthy document with numerous enclosures that are specifically incorporated as exhibits. Such a document tells the story of the offenses in detail to include the who, what, when, where, how, and importantly, why the accused committed the offenses. The stipulation specifically excludes any possibility of a defense, and it includes aggravating factors, such as victim impact. The stipulation can be used to specifically waive motions and include agreed upon credit for any pretrial restraint. All supporting documents can be attached as enclosures and become part of the exhibit. For the defense, if there is any mitigation, that can be included as well. Everything is laid out in the document.

In addition to aiding the judge in determining the accused's guilt, the document is also used by the sentencing authority. If there is a panel for sentencing, a detailed stipulation is essential for their understanding of the facts and circumstances of the offenses to which the accused pleads guilty. Whether viewed before accepting the guilty plea or after, when determining the issue of clemency, the stipulation of fact is a key document to be viewed by the GCMCA. The stipulation of fact can be viewed by victims or victim's families. The stipulation of fact is a key document for appellate courts to consider, should issues arise. Finally, consider that a convicted soldier is before a parole board many years after the offense. Victims or their families may consider presenting the stipulation of fact to the parole board for consideration. Whatever the form of the stipulation, it should be evident that it is a critical document in the plea process.

### **C. The Guilty Plea Inquiry**

After the arraignment when the accused enters his or her plea of guilty, the military judge enters into a detailed colloquy with the accused and the counsel.<sup>50</sup> Without reiterating the entire script that appears in the *Military Judge's Benchbook*, it is worth highlighting the key sections of the inquiry to give the reader a sense of the dialogue.

The military judge goes to great lengths to ensure the accused understands the full meaning and effect of the guilty plea, the documents that are part of the plea, and most importantly, that the accused is in every way, shape, and form entering the guilty plea voluntarily and without any coercion whatsoever from any party. To any civilian lawyer or layperson who has ever observed a court-martial guilty plea, it is evident that the military judge gives the accused multiple opportunities to withdraw from the guilty plea. Indeed, if the military judge in any way feels the accused is not fully committed to pleading guilty, the judge

may suspend the proceedings or enter a plea of not guilty on behalf of the accused and require the government to prove the accused's guilt beyond a reasonable doubt.

The judge explains to the accused that "a plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law."<sup>51</sup> The judge gives the accused ample opportunity to ask questions and consistently asks the accused if he understands what is going on. The judge explains the three important rights the accused gives up when pleading guilty (the right against self-incrimination, the right to a trial of the facts by the court, and the right to be confronted by and cross-examine witnesses against the accused).

The next major line of inquiry is with respect to the aforementioned stipulation of fact, covering its uses and reviewing its contents with the accused. After ensuring the accused agrees with the uses and its contents and that they are all true, the judge covers the factual basis of the plea using the facts contained in the stipulation in connection with the elements of the offenses.

After the accused has voluntarily admitted to all of the elements of the offenses to which he is pleading guilty, the military judge covers the maximum punishment the accused could be sentenced to, based solely upon the plea of guilty. If there is no pretrial agreement, the military judge goes right to acceptance of the plea. If there is a pretrial agreement, the military judge essentially goes line by line through the Offer to Plead Guilty Portion of the pretrial agreement, which is marked as a separate appellate exhibit from the Quantum Portion (which the judge will not view until after sentence is announced in a judge-alone case). If members are doing the sentencing, the judge can view the quantum portion during the inquiry.

The final phase of the guilty plea inquiry is the military judge's acceptance of the accused's plea or pleas of guilty. The judge ensures that the defense counsel has had ample opportunity to discuss the case with the accused, and asks the accused if he has had enough time with his counsel and, importantly, if he is satisfied with his counsel and his counsel's advice, and whether he believes the counsel's advice was in his best interest.

Once more, the judge asks the accused if he is pleading guilty voluntarily and of his own free will and whether he has been threatened or coerced into pleading guilty. If applicable, the judge covers sex offender registration in detail. However, just before that discussion, the judge asks the accused the following, reminding all in the courtroom what would happen if the accused plead not guilty:

Do you understand that even though you believe you are guilty, you have the legal right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?<sup>52</sup>

Finally, before announcing findings in the case, one final statement of the military judge is worth noting in full as it summarizes many key points of the plea process:

[Accused], I find that your plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, your plea of guilty is provident and is accepted. However, I advise you that you may request to withdraw your guilty plea at any time before the sentence is announced, and if you have a good reason for your request, I will grant it.<sup>53</sup>

With that, the judge enters findings of guilty to those charges to which the accused pled guilty. The court-martial then proceeds to the sentencing phase, which is beyond the scope of this article. Yet, as described above the contents of the quantum portion of the pretrial agreement will remain a key component of court-martial after the sentence is announced and through the final action by the GCMCA.

## V. Conclusion

With a high percentage of courts-martial resulting in guilty pleas, plea bargaining is critical to the fair and efficient processing of cases in the military. There is an art and a science to plea bargaining in the courts-martial process.

While the heart of the negotiations occurs between trial counsel and defense counsel, the essential parties to any pretrial agreement are the accused soldier and the convening authority.

The expertise and experience of military lawyers, from trial and defense counsel to SJAs, is essential to the process of advising accused, victims, and convening authorities. Although no military legal practitioner can guarantee any result to an accused, a victim, or the convening authority, an understanding of the general results in criminal jurisdiction is informative to help guide the process and give educated opinions on the parameters for negotiations.

Negotiations are an art, but the drafting of a pretrial agreement is a science. The rules for courts-martial provide strict guidelines for acceptable pretrial agreements. One key provision that is most often included as a requirement is an agreed upon stipulation of fact. This essential document allows the trial counsel, defense counsel, and accused to draft a document that contains all legally permissible evidence and other aggravating or mitigating facts that will inform the court, the convening authority, and other post-trial agencies about the details of the case.

A final critical part of the plea process is the guilty plea inquiry between the judge and the accused. This detailed dialogue serves to eliminate any doubt about the voluntary nature of the accused's plea and his willing forfeiture of his constitutional rights to remain silent, to a trial of the facts, and to confront witnesses against him, as well as waiving other procedural rights in the process.

As in the civilian courts, a successfully executed agreement obtained through a transparent and fair plea

bargaining process greatly contributes to the overall fair and efficient administration of justice in military criminal cases.

## Notes

- \* Student, U.S. Army War College. B.B.A., University of Massachusetts, Amherst; J.D., New England School of Law, Boston, Massachusetts. During twenty-one years in the military, the author has served as a prosecutor, defense counsel, Chief of Military Justice, Deputy Staff Judge Advocate, and most recently as the Staff Judge Advocate for the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, and Combined Joint Task Force 101, Bagram, Afghanistan. Disclaimer: The comments and views in this article are attributable solely to the author and not the U.S. Army or the U.S. Army Judge Advocate General's Corps.
- <sup>1</sup> The UCMJ is applicable to all military services; however, this article uses a hypothetical scenario in the United States Army.
- <sup>2</sup> See Rules for Courts-Martial in Manual for Courts-Martial, United States, RCM 306 and 307 (2012) [hereinafter R.C.M., MCM]. Charges are preferred on a Charge Sheet (Department of Defense Form 458).
- <sup>3</sup> Private First Class is the soldier's rank, and E-3 is his or her enlisted pay grade. The lowest enlisted pay grade is E-1 and the highest is E-9.
- <sup>4</sup> The charge sheet and the company commander's recommendation on the level of disposition will be forwarded to the battalion commander (summary court-martial convening authority). See also MCM, *supra* note 2, RCM 401-404.
- <sup>5</sup> See UCMJ (2012); MCM, *supra* note 2, Part IV (Punitive Articles), Articles 86 and 121.
- <sup>6</sup> See MCM, *supra* note 2, RCM 305 for rules on Pretrial Confinement.
- <sup>7</sup> In general, a military defense counsel will follow a checklist of essential issues to cover during an initial meeting with a client facing court-martial charges. After thoroughly reviewing the referral packet provided by the government, the defense counsel will have a general idea of the charges and some of the evidence on which those charges are based. Early in the process, in addition to explaining the attorney-client privilege, the defense counsel will explain the accused's four main constitutional rights as they apply to this early stage of the court-martial process (right to counsel, right to plead not guilty, forum rights; and if pleading not guilty, the right to testify on the merits of the case). For the right to counsel, the accused is detailed a trial defense counsel free of charge, or the accused may request a specific military counsel subject to certain provisions, or the accused may hire a civilian defense counsel at no expense to the government (and retain their detailed trial defense counsel). For forum rights, the accused has three options: a panel (jury) of officers, an enlisted panel, or trial by military judge alone. The default panel is a panel of officers. An enlisted soldier can request an enlisted panel, which is made up of one-third enlisted members. For the panel cases, the minimum number of members (or quorum) is three members for a special court-martial and five members for a general court-martial. These four rights are the same rights a military judge describes and explains to an accused soldier at an arraignment (see *id.* at RCM 904; and U.S. Dep't of Army Pamphlet 27-9, Military Judge's Benchbook, Ch. 2 (2014) [hereinafter Da Pam 27-9, Benchbook]). All decisions on these four rights are made by the accused soldier with advice from the defense counsel.
- <sup>8</sup> UCMJ art. 15 (2012).
- <sup>9</sup> All known offenses should be included in the charges (MCM, *supra* note 2, RCM 307(c)(4)), and although permissible, it is a rare occasion when an offense previously disposed of through UCMJ Article 15, is thereafter charged again at

a court-martial. Other than those rare occasions where a prior offense, previously punished under Article 15, is charged again, the trial counsel usually opts to offer evidence of prior Article 15s, if admissible, as evidence in aggravation in the sentencing phase of the court-martial. (See Da Pam 27-9, Benchbook, *supra* note 7, at Table 2-6, Table of Equivalent Punishments). In the normal course of business, evidence of prior Article 15s, if admissible, can be used as evidence in aggravation in the sentencing phase of the court-martial.

- <sup>10</sup> U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations, Ch. 10, (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200].
- <sup>11</sup> The maximum punishments for each offense are combined into one sentence. The punishment includes four, and sometimes five, primary elements: reduction in rank, forfeiture of pay, confinement, a punitive discharge, and sometimes a fine. Each offense will have a maximum punishment (see MCM, *supra* note 2, App. 12, Maximum Punishment Chart). In calculating the combined maximum punishment at a general court-martial, the maximum (or worst) punitive discharge for any single offense becomes the maximum punitive discharge for that one element of the sentence. For example, if one offense has a maximum punitive discharge of a bad-conduct discharge and a second offense on the same charge sheet has a maximum punitive discharge of a dishonorable discharge, then the punitive discharge element for the sentence is a dishonorable discharge. For the maximum confinement, each offense's confinement amount are added together for the total maximum confinement. Leaving aside reduction in rank and fines, the maximum punishment chart includes three elements: forfeitures, confinement, and the type of discharge (a bad-conduct discharge or a dishonorable discharge). In the scenario above, the maximum punishment for larceny of non-military property over \$500 is: reduction to Private E-1, total forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. The maximum punishment for AWOL more than 3 days but less than 30 days is: reduction to Private E-1, 6 months confinement, and forfeiture of 2/3 pay per month for 6 months. No punitive discharge is authorized for the AWOL offenses. When combined, the maximum punishment for the larceny offense is the maximum, and the confinement authorized for the AWOL (6 months) is added to the total to get the 66-month total.
- <sup>12</sup> Discharges from the military include administrative discharges (Honorable; General, Under Honorable Conditions; General, Under Other Than Honorable Conditions) (see AR 635-200, *supra* note 10, para. 3-7) and punitive discharges (Dismissal, Dishonorable Discharge, and Bad-Conduct Discharge) (see MSM, *supra* note 2, RCM 1003(b)(8)(A)-(C)). Note that for an officer, a punitive discharge is called a Dismissal and in practice is considered the functional equivalent of a Dishonorable Discharge. An officer cannot get Bad-Conduct Discharge; *id.*, RCM 1003(b)(8)(A). At court-martial, a convicted soldier (or officer) cannot receive an administrative discharge. A court-martial may only adjudge a punitive discharge or no discharge at all. A dishonorable discharge is more severe than a bad-conduct discharge. A dishonorable discharge can only be adjudged at a general court-martial; *id.*, RCM 1003(b)(8)(B). The distinction between the two is best described by the military judge's benchbook instructions. For a Dishonorable Discharge, the military judge instructs the members:

Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. . . . A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of

serious offenses of a civil or military nature warranting such severe punishment.

By comparison, the instructions for a Bad-Conduct Discharge are:

A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who, in the discretion of the court, warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).

DA Pam 27-9, Benchbook, *supra* note 7, at 1180. See also *infra* note 22 for a detailed explanation of administrative discharges.

13 MCM, *supra* note 2, RCM 201(f)(2)(B).

14 *Id.* at RCM 404 and 405; and UCMJ art. 32 (2012).

15 To be sure, the defense counsel's meeting with her client included a detailed explanation of all of the soldier's rights and options, primarily the soldier's right to counsel and the right to plead Not Guilty. Along with the right to plead Not Guilty, the defense counsel would explain those three critical rights that would be given up with a guilty plea: the right against self-incrimination, the right to a trial of the facts by the court, and the right to confront and cross-examine witnesses against the soldier. The defense counsel would also explore whether any of the soldier's constitutional rights were violated in the investigatory stage, whether there were any violations of the soldier's 4th or 5th Amendment rights, and whether there was proper personal and subject matter jurisdiction in the case. Only after exploring all such issues and determining they do not exist would the defense counsel advise a soldier to seek a pretrial agreement.

16 Written counseling is accomplished on a Department of the Army Form 4856, Developmental Counseling Form. In addition to required quarterly counseling for performance, soldiers can and should be counseled immediately following acts of misconduct. AR 635-200, Administrative Separations, paragraphs 1-16 through 1-18 (*supra* note 10) provide guidelines for putting soldiers on notice for potential separation following disciplinary infractions.

17 In general, in the U.S. Army command and rank structure, a SCMCA is usually a battalion-level commander, typically a lieutenant colonel (LTC/O-5). The SPCMCA is usually a brigade-level commander, usually a colonel (COL/O-6). With few exceptions, the GCMCA is a general officer with command authority over a division, an installation, or any other major command. Some military installations have multiple GCMCAs, each in charge of their own separate command for UCMJ purposes.

18 For General Courts-martial, see Maximum Punishment Chart for each specified offense (see MCM, *supra* note 2, RCM 201(f)(1) and Part IV). For special courts-martial, see RCM 201(f)(2)(B), which states that the maximum punishment authorized is reduction to the lowest enlisted grade, confinement for one year, hard labor without confinement for three months, and forfeiture of two-thirds pay per month for 12 months. For summary courts-martial, see RCM 1301(d)(1), which states that the maximum punishment is confinement for 30 days, hard labor without confinement for 45 days, restriction for two months, and forfeiture of two-thirds pay per month for one month. It is important to note that a service-member above the fourth enlisted grade cannot be subject to confinement or hard labor without confinement, and may only be reduced one pay grade (see *id.*, RCM 1301(d)(2)).

19 *Id.* at RCM 406.

20 Of course, the government can oppose production of certain defense witnesses and experts, and when contested, the military judge will decide the issue of production. If production is

ordered, the government pays the expense. See *id.* at RCM 703.

21 *Id.* at RCM 705(d)(1).

22 See AR 635-200, *supra* note 10, at para. 10-8.

23 For purposes of this explanation, this includes victims in the form of an actual person. In cases where no actual person is victimized or suffers a loss, the "government" is considered the victim. The most common examples are larceny of military property or fraud against the government.

24 See AR 635-200, *supra* note 10, at para. 10-3 for a description of the documents that accompany a Chapter 10 request.

25 Without belaboring the details of the administrative separation process in the military, for present purposes, it is sufficient to note that, according to AR 635-200, a Chapter 14 in the Army governs administrative separations for misconduct. In the vast majority of cases, after a soldier commits misconduct and receives nonjudicial punishment, administrative discharge proceedings under Chapter 14 are initiated. This was briefly mentioned in the hypothetical above. Depending on the circumstances, the soldier could receive a General or OTH Discharge under Chapter 14. In the negotiations noted here, the defense and government have taken an innovative approach—this "Super Charge" scenario—to plea-bargain down from a special or general court-martial to a summary court-martial.

26 Since the soldier would plead guilty at the summary court, he will be punished; however, it is important to note that no particular punishment can be dictated. It is solely within the province of the summary court-martial officer to administer a punishment he or she deems fair based on the evidence presented in that case.

27 Under Chapter 14, if the command recommends an OTH Discharge, a soldier, regardless of time in service, is entitled to an administrative separation board. Again, without discussing those procedures in detail, the main point is that under the Super Charge, the soldier can be issued an OTH without going through the lengthy administrative separation board process.

28 As a side note, it is interesting to note that such a deal negotiated and approved at the SCMCA level actually binds a GCMCA to later approve an OTH for the soldier even if the GCMCA believed the offenses warranted a higher level of disposition.

29 MCM, *supra* note 2, RCM 201(f)(2) and 601(b). While a SPCMCA can refer a case to a BCD Special court-martial, in practice, GCMCAs reserve this referral authority to their level.

30 In the hypothetical case, if the stolen computer was not recovered from the pawn shop and returned to the roommate, the government may consider restitution as part of the agreement. Adding this condition must be an informed decision. For example, can the accused come up with the money? Did the roommate claim it on an insurance policy?

31 MCM, *supra* note 2, RCM 705(b).

32 *Id.* at RCM 705(b)(2)(E) Discussion.

33 *Id.* at RCM 705(c)(1)(B).

34 *Id.* at RCM 705(c)(2)(A). Stipulations of Fact are discussed in more detail below.

35 *Id.* at RCM 705(c)(2)(B).

36 *Id.* at RCM 705(c)(2)(C).

37 *Id.* at RCM 705(c)(2)(D).

38 *Id.* at RCM 705(c)(2)(E).

39 *Id.* at RCM 705(d)(3).

40 In practice, the language on the quantum portion is drafted in a very precise manner; for example, the convening authority agrees to disapprove any confinement in excess of 12 months and all other lawful punishment may be approved.

41 *Id.* at RCM 705(d)(4).

42 *Id.* at RCM 811.

<sup>43</sup> *Id.* at RCM 910(h)(1).

<sup>44</sup> *Id.* at RCM 910(h)(2).

<sup>45</sup> The National Defense Authorization Act for Fiscal Year 2014 (July 8, 2013).

<sup>46</sup> UCMJ art. 60(c)(3)(A)–(D).

<sup>47</sup> UCMJ art. 60(c)(4)(C).

<sup>48</sup> UCMJ art. 60(c)(4)(C)(i).

<sup>49</sup> Da Pam 27-9, Benchbook, *supra* note 7, at 107.

<sup>50</sup> *Id.* at Ch. 2, Section II, pp. 14–29.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 27.

<sup>53</sup> If the pretrial agreement required other charges to be dismissed, that process would have been completed prior to findings. Also, if the government planned to prove any charges the accused pled not guilty to, that also would take place prior to findings.