

## CHAPTER 11

### **Pretrial Agreements**

The rules pertaining to pretrial agreements in the military are contained in Rule for Courts-Martial (R.C.M.) 705. Section 0137 of the Manual of the Judge Advocate General (JAGMAN) provides further guidance on pretrial agreements for the Navy and Marine Corps. JAGMAN 0137c provides specific guidance on pretrial agreements in national security designated cases. In all classified information cases involving pretrial agreements, judge advocates should draft pretrial agreements as unclassified documents and strive to keep as much, if not all, of the record of trial unclassified. Even at this relatively late stage of the court-martial process, a goal is to avoid as many logistical issues involved with the handling of classified documents as possible. As with all pretrial agreements, judge advocates must ensure that pretrial agreements in cases involving classified information are clear, precise, and inclusive of all contingencies. Sub rosa agreements are prohibited.

**A. Prohibited Terms or Conditions.** R.C.M. 705(c)(1) prohibits the inclusion of any term or condition not freely and voluntarily agreed to by the accused. Additionally, a term or condition is not enforceable if it denies the accused of certain unwaivable rights including the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to speedy trial, the right to complete sentencing proceedings, and the right to exercise post trial appellate rights. Although not specifically mentioned in R.C.M. 705(c), any pretrial agreement provision closing the court-martial to the public without complying with *Grunden and R.C.M. 806(b)(2)* infringes on the accused's right to, and the public's interest in, a public trial.

**B. Permissible Terms or Conditions.** R.C.M. 705(c)(2) discusses terms and conditions that either party may propose for inclusion in a pretrial agreement. Permissible terms or conditions include a promise to enter into a stipulation of fact, a promise to testify as a witness in the trial of another person, a promise to provide restitution, a promise to conform conduct to probation terms, and a promise to waive procedural requirements. Additionally, there are several unique provisions related to pretrial agreements in cases involving classified information. The sample pretrial agreement in Appendix 11-A contains suggested language for these special provisions. The following sections summarize pretrial agreement issues unique to cases with classified information.

**1. Pre-Pleading Debrief.** Prior to entering pleas, the accused may agree to take part in a debrief that normally includes cooperation during a series of interviews and polygraph examinations. In courts-martial involving classified information, the principal goal of the debrief process is normally to ascertain the extent of the loss and/or compromise and develop a full appreciation for numerous other counterintelligence issues. Provisions providing for such interviews must clearly set forth the scope of the interview, the role of the defense counsel, and the period of time for which the accused agrees to cooperate. Military Rule of Evidence (M.R.E.) 410(a)(4) protects statements made by the accused during this debrief process when the debrief occurs as part of the plea negotiation process. M.R.E. 410 prohibits the use of the accused's statements in a subsequent court-martial proceeding against the accused when the statements are made "in the course of

plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government which do not result in a plea of guilty or result in a plea of guilty later withdrawn.”

**2. Pre-Sentencing Debrief.** A second option is for the accused to take part in a debrief between the acceptance of the plea and the sentence, i.e., a pre-sentencing debrief. In this scenario, M.R.E. 410 does not protect the statements of the accused from use in a subsequent prosecution since the debrief does not occur during the course of plea discussions. Therefore, a grant of immunity is normally part of a pretrial agreement that includes a pre-sentencing debrief requirement. Except for the applicability of M.R.E. 410, the issues discussed in B.1 apply to pre-sentencing debriefs as well.

**3. Post-Sentencing Debrief.** A third, and most frequently used option in the court-martial process, is for the accused to take part in a debrief after the sentencing phase of the court-martial, i.e., a post-sentencing debrief. Again, in this scenario, M.R.E. 410 does not protect the statements of the accused from use in a subsequent prosecution. Therefore, a grant of immunity is also normally a part of a pretrial agreement that includes a post-sentencing debrief requirement. Except for the applicability of M.R.E. 410, the issues discussed in B.1 apply to post-sentencing debriefs as well.

**4. Stipulation Concerning Classification Level of Information.** The accused may stipulate that relevant evidence is classified at a particular level and agree to refrain from objecting to its admissibility at trial. The accused can also agree to refrain from introducing classified information during the court-martial. Although, neither of the above two stipulations represent an adequate substitute for the government’s responsibilities with respect to closing the court-martial pursuant to *Grunden* and R.C.M. 806, both stipulations support the government’s effort to avoid as many logistical burdens associated with a classified record of trial as possible.

**5. Agreement Not to Seek Security Clearance.** The accused may agree not to seek a security clearance or employment requiring a security clearance for a period of time after the court-martial concludes. See also the discussion of the Smith Amendment in Chapter 12.

**C. Approval of Pretrial Agreements in National Security Cases.** There is a unique requirement for a pretrial agreement in any case that is designated as a national security case pursuant to JAGMAN 0126. JAGMAN 0137c provides that the national security case designation authority (NSCDA), as the convening authority, must obtain permission from the Secretary of the Navy prior to entering into a written pretrial agreement. The NSCDA request format for permission from the Secretary of the Navy is a priority message or naval correspondence with information copies to the Chief of Naval Operations or Commandant of the Marine Corps, as appropriate, and Office of the Judge Advocate General (Code 17). The request must include the following:

1. The exact text of the proposed pretrial agreement;

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2. A statement of the factual background of the offense(s);
3. Information pertaining to the identity of the accused;
4. A summary of the evidence that would be available for introduction at trial before findings or during any sentencing portion of trial by the Government; and
5. A summary of the factors that warrant entry into a pretrial agreement.

The JAGMAN requires that the Secretary of the Navy approve pretrial agreements. Each Secretary of the Navy develops their own process for approving the agreements. For example, a recent Secretary of the Navy required the convening authority to forward negotiating parameters for approval prior to entering negotiations. Code 17 recommends that convening authority staff judge advocates consult with Code 17 and the Secretary of the Navy's Special Assistant for Legal and Legislative Matters in future cases prior to entering into negotiations and inquire whether any current guidance is available on this issue.



**Practice Pointer:** Obtaining approval for a pretrial agreement is similar to obtaining the assertion of the privilege under M.R.E. 505 - both require personal action by the Secretary of the Navy. Early coordination with Code 17 will facilitate the process.

**D. Grants of Immunity.** As discussed above in paragraph B., the government has an incentive to grant the accused immunity to encourage cooperation in the pre-sentencing and post-sentencing debrief process. (The government's goal could also include the more traditional pursuit of testimony against a co-accused.) The accused's interest in a grant of immunity is self evident. Additionally, the accused's agreement to support the debrief process can lay the groundwork for a defense argument that the accused warrants a more lenient sentence due to the accused's cooperation. Pursuant to JAGMAN § 0138, "[i]n all cases involving national security or foreign relations of the U.S., the cognizant GCMCA shall forward, in the form prescribed in section 0139, any proposed grant of immunity to OJAG (Code 20, via Code 17) for the purpose of consultation with the Department of Justice." The Department of Defense Instruction that implements the Memorandum of Understanding (MOU) between the Departments of Justice and Defense regarding the investigation and prosecution of certain types of crimes, Annex E, includes a somewhat overlapping but broader consultation requirement at paragraph B.3. under "Supplemental Guidance:"

A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with DoJ.

The cognizant Department of Justice Division for both of these regulatory requirements is the National Security Division, Counterespionage Section. JAGMAN §§ 138-140 and

R.C.M. 704 contain detailed discussions of grants of immunity. Contact Code 17 for substantive support and assistance in coordination with the Department of Justice and Department of Defense General Counsel whenever the convening authority is contemplating grants of immunity in a court-martial involving classified information.

**E. Providency and Stipulations of Fact.** As with any guilty plea, the military judge must craft questions for the accused to ensure the accused has pleaded providently in a guilty plea case with classified information. As classified information cases may involve charges alleging violations of federal statutes charged under Art. 134, UCMJ, preparation for the providence inquiry may be a bit more involved. This is not because the charges are any longer or more complicated, but simply because the federal statutes are not organized in the same manner as offenses defined in the UCMJ. For offenses specifically defined in the UCMJ, the MCM provides the text of the statute, the elements, and an explanation of terms. For federal statutes, there is no similar detail or explanation. The trial counsel, by virtue of an in-depth knowledge of the case, can assist the military judge by proposing questions that focus on the specific facts of the case relevant to each element of the offense. Defense counsel also must be able to anticipate the line of questioning in order to fully prepare clients for the providency process.

Appendix 11-B contains a proposed breakdown of elements and sample specification for assimilating 18 U.S.C. 793, the Federal Espionage Statute, under Article 134. For more discussion on charging 18 U.S.C. 793, see Chapter 8.

**APPENDIX 11-A**

**Sample Pretrial Agreement**

DEPARTMENT OF THE NAVY  
(GENERAL/SPECIAL) COURT-MARTIAL  
NAVY AND MARINE CORPS TRIAL JUDICIARY  
( ) JUDICIAL CIRCUIT

U N I T E D S T A T E S

v.

(NAME OF ACCUSED)

RATE/RANK USN/USMC

MEMORANDUM  
OF  
PRETRIAL AGREEMENT

(Part I)

I, (Rate/Rank, Name, Service), the accused in a (general/special) court-martial, in exchange for good consideration and after thorough consultation with my defense counsel, do fully understand and agree to the following terms and conditions:

1. I agree to enter pleas of **GUILTY** as indicated below. I do so fully understanding that, unless otherwise specified in Part II of this agreement (the Maximum Sentence Limitation Appendix), the Convening Authority may approve any sentence adjudged by the court-martial, but shall order executed only that sentence which does not exceed the lesser of the sentence contained in Part II of this agreement or the sentence adjudged by this court-martial.

[Note: If the agreement is for the Convening Authority to refer the charges and specifications to a special court-martial vice a general court-martial (i.e., a "Bareback SPCM"), such agreement should be addressed in Part II (the Maximum Sentence Limitation Appendix). See sample provision in Paragraph 6 of the Sentence Limiting Appendix attached.]

2. This agreement (Parts I and II) constitutes all the conditions and understandings of both the government and myself regarding the pleas in this case. There are no other agreements, written or otherwise.

3. I understand that the convening authority in this case may approve and order executed any lawfully adjudged sentence awarded by this court-martial, or any automatic sentence or portion thereof, except as specifically limited by Part II, the sentence limitation portion of this agreement. I also understand that the sentence limitation portion of this agreement addresses, each of the following distinct parts of the sentence that may be adjudged in this case: (1) punitive discharge, (2) confinement and/or restraint, (3) forfeiture and/or fine, (4) reduction in pay grade, and (5) any other lawful punishment that may be adjudged.

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4. I am satisfied with my defense counsel in all respects and consider (him/her/them) qualified to represent me at this court-martial.

5. I am entering into this agreement freely and voluntarily. Nobody has made any attempt to force or coerce me into making this agreement or into pleading guilty.

6. I have been fully advised by my defense counsel of, and I fully understand and comprehend the meaning and effect of, my guilty pleas and all attendant effects and consequences, including the possibility that I may be processed for administrative discharge from the (United States Navy Navy/Marine Corps). I understand that such an administrative discharge could result in an other than honorable characterization of service, unless otherwise limited by this agreement, even if part or all of the sentence, including a punitive discharge, is suspended or disapproved for any reason.

[Note: If the agreement includes the accused waiving an administrative discharge board, such waiver may be addressed either here or in paragraph 15, infra, the “Specially Negotiated Provisions,” at the discretion/election of the parties. See sample provision in “Specially Negotiated Provisions” section, infra].

7. I understand that I may ask permission to withdraw any of my pleas of guilty at any time before they are actually accepted by the military judge. I also understand that I may ask to withdraw any of my pleas of guilty after they have been accepted, but before sentence is announced, and the military judge may, at his/her discretion, permit me to do so.

8. I understand that this pretrial agreement may become null and void, and the convening authority can withdraw from this agreement, in the event that any of the following occur:

(1) I fail to plead guilty as required by this agreement;

(2) The court refuses to accept any of my pleas of guilty;

(3) The court sets aside any of my pleas of guilty for whatever reason, including upon my request, before sentence is announced;

(4) I fail to satisfy any material term of this agreement; or

(5) I fail to plead guilty as required by this agreement at a rehearing should one occur.

9. I understand that if this agreement becomes null and void, then my offer to plead guilty and enter into this agreement cannot be used against me in any way in determining whether I am guilty or not guilty of the charges alleged against me at this court-martial.

10. I understand that if the approved sentence includes a punitive discharge or confinement in excess of 90 days (or 3 months), whether the sentence is suspended or not, Article 58a of the UCMJ and § 0152 of the JAGMAN require that I suffer automatic administrative reduction in pay grade to the lowest enlisted paygrade, E-1, unless the Convening Authority takes action to remit or suspend the automatic reduction.

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11. I understand that if the adjudged sentence includes either a punitive discharge and confinement, or confinement in excess of six months, whether the sentence is suspended or not, Article 58b of the UCMJ requires the automatic imposition of forfeitures of (2/3 pay per month) (all pay and allowances) due during any period of confinement awarded, unless the Convening Authority takes action to waive or defer the automatic forfeiture provision. Forfeitures, whether adjudged or automatic, take effect upon the convening authority's action in this case or 14 days after sentence is adjudged, whichever is earlier. I understand that I may request in writing that the convening authority defer execution of forfeitures until the convening authority takes action in this case. I also understand that I may request that the convening authority waive automatic forfeitures for a period up to six (6) months from the date of the convening authority's action. Finally, I understand that if I am held in confinement beyond my End of Active Obligated Service (EAOS) date, then I will not receive any pay or allowances by operation of law, regardless of the terms of this agreement.

12. I understand that should I commit any misconduct (i.e., any act or omission in violation of the UCMJ or any punitive statute of the United States Code, which constitutes a material breach of this agreement) after the signing of this pretrial agreement but before the date of trial, such misconduct may be the basis for the convening authority to unilaterally withdraw from the pretrial agreement, rendering the entire agreement null and void. I further understand that if I commit misconduct after the date of trial, but before the date of the convening authority's action, the convening authority may, after first complying with notice and hearing requirements consistent with Article 72, UCMJ and R.C.M. 1109, withdraw from the sentence limitation provisions of this agreement. Should the Convening Authority withdraw from the sentence limitation provisions of this agreement based on misconduct occurring after the date of trial but before action is taken in my case, I understand that any provisions in the pretrial agreement relating to suspension of any aspect of my sentence would become null and void in all respects, and that the entire sentence adjudged at my court-martial may be approved and imposed upon me.

13. I also understand that should I commit any misconduct after the date of the Convening Authority's action, but before I have completed serving the entire sentence (including any period of suspension or probation) as finally approved and executed, the Convening Authority may, after complying with the procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed to in this pretrial agreement or as otherwise approved by the Convening Authority, and that previously suspended portion of my sentence could be imposed upon me.

14. I understand that I may be placed on appellate leave in a no pay status under the provisions of Article 76a of the UCMJ, notwithstanding any provision regarding forfeitures or fines in Part II of this agreement, if the sentence, as approved, includes an unsuspended punitive discharge. (Furthermore, I agree that, should a punitive discharge be adjudged, I will submit, within \_\_\_ days from the date of the conclusion of my trial, a written request to be placed on appellate leave without pay or allowances.)

15. Additional Provisions.

As consideration for this agreement, and after having fully discussed the issue with my defense counsel:

[Examples of Common Specially Negotiated/Alternative Provisions:]

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

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

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

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

[\*\* "Bareback" Specials – The Bareback" Special provision is located (and should always be placed in) Paragraph 6 of Part II of the agreement (the Maximum Sentence Appendix) so that the military judge is not on notice of what the sentence maximum will be.]

[\*\*Withdraw language to which accused pled Not Guilty\*\*]

I understand and agree that, in return for my plea(s) of guilty, and following the military judge's acceptance of my plea(s) as set forth below, the convening authority will withdraw the language and/or charges and specifications to which I have pled not guilty. After announcement of the sentence by the military judge, the withdrawn language and/or charges and specifications will be dismissed by the convening authority with/without prejudice.

[\*\*Government going forward on not guilty pleas\*\*]

I understand and agree that the convening authority, through the assigned Trial Counsel, may go forward on the charges and/or language to which I have entered pleas of not guilty.

[\*\*Waive Administrative Discharge Board\*\*]

I agree to waive any administrative discharge board, that is based on any act or omission reflected in the charge(s) and specification(s) that is/are the subject of this Agreement. I understand that any administrative discharge will be characterized in accordance with service regulations, and may be under other than honorable conditions. I fully understand the nature and purpose of an Administrative Discharge Board, and the rights that I would have at such a Board.

[\*\*RESTITUTION: Select from one of the following 3 paragraphs\*\*]

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

I agree to make restitution by [cashier's check/money order] in the amount of \$\_\_\_\_\_, made payable to the economic victim of my misconduct, (Name(s) of Victim(s)), prior to the date of trial. I expressly represent that I will have the economic means to make restitution prior to the date of trial. The [cashier's check/money order] will be delivered to the trial counsel at least one day prior to the date of trial. I fully understand that failure on my part to meet this obligation may serve as the basis for the Convening Authority to withdraw from this agreement, rendering it null and void.

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[OR]

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[\*\*2. Will have means to make restitution prior to a certain date\*\*]

I agree to make restitution by [cashier's check/money order] in the amount of \$\_\_\_\_\_, made payable to the economic victim of my misconduct, (Names(s) of Victim(s)) by DD Month YYYY. I expressly represent that I will have the economic means to make restitution by DD Month YYYY and understand that my paying restitution to the victim is a material term of this agreement. The [cashier's check/money order] will be delivered to the trial counsel or staff judge advocate on that date. I fully understand that failure on my part to meet this obligation may serve as the basis for the Convening Authority to withdraw from this agreement, rendering it null and void, or may serve as the basis for the Convening Authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve that previously suspended sentence.

[OR]

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

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

[\*\*Testify W/Grant of Immunity in another case\*\*]

If I am provided a grant of testimonial immunity, I agree to testify truthfully if called as a witness in the case of United States v. \_\_\_\_\_ pertaining to my involvement in or knowledge of \_\_\_\_\_. I further agree to fully and or any other punitive, judicial, or administrative proceeding requested of my by the Convening Authority truthfully cooperate in the court-martial process, to include interviews with appropriate law enforcement authorities and the trial and defense counsel involved in the case, as well as any other reasonable request made of me.

[\*\*Testify W/O Grant of Immunity in another case\*\*]

Even if I am not provided a grant of testimonial immunity, I agree to testify truthfully if called as a witness in the case of United States v. \_\_\_\_\_ or any other punitive, judicial, or administrative proceeding requested of my by the Convening Authority. I further agree to fully and truthfully cooperate in the court-martial process, to include interviews with appropriate law

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enforcement authorities and the trial and defense counsel involved in the case, as well as any other reasonable request made of me.

[\*\*Stipulation of Fact\*\*]

[\*\*Stipulation is an appendix to the Agreement\*\*]

I agree to enter into the Stipulation of Fact contained in Appendix I. I agree that the facts contained therein are true and may not be contradicted by either side. I further agree not to object to the stipulation's admission during the providence inquiry/on the merits/ and/or during the pre-sentencing proceeding.

[Stipulations of Fact are common in classified information cases. They are often used to establish the admissibility of the Classification Reviews]

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

I agree to enter into a stipulation of fact, which describes the facts and circumstances surrounding the offenses to which I am pleading guilty. I understand that the failure of the parties to reach a mutually agreed upon stipulation of fact may result in either side withdrawing from this agreement. I further agree not to object to the mutually agreed upon stipulation's admission during the providence inquiry/on the merits/ and/or during the pre-sentencing proceeding.

[\*\*Witness Considerations\*\*]

[\*\*Call certain witnesses only\*\*]

I intend to request the presence of \_\_\_\_\_ [as a witness/as witnesses] at my court-martial. Provided that the convening authority agrees to produce these witnesses, I will not request any other witnesses. This provision has not interfered with my selection of witnesses or in presenting a complete [defense/case in extenuation and mitigation].

[\*\*Call no witness or call only local witnesses\*\*]

I agree not to request, at government expense, the presence of any witness located (out of the area)(outside a 100-mile radius of \_\_\_\_\_). This provision does not interfere with my ability to present an effective and complete [defense/case in extenuation and mitigation]. I intend to use alternative means to present this material. (The government specifically agrees not to object to the admission into evidence of written statements in extenuation and mitigation from witnesses located (out of the area)(outside a 100-mile radius of \_\_\_\_\_).

[\*\*Stipulation of Testimony\*\*]

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I agree to stipulate to the testimony of the following witnesses: \_\_\_\_\_. I understand that the stipulation does not admit the truth of the testimony, which may be attacked, contradicted or explained in the same way as any other testimony.

[\*\*Trial Date Consideration\*\*]

I agree, and am fully prepared, to go to trial and offer to go to trial no later than \_\_\_\_\_. I understand that I will not be deemed to have breached this agreement if the judiciary cannot schedule my trial by this specific date.

[\*\*Motion Consideration – the specific motions waived need to be specified – the language “all waivable motions” is unacceptable\*\*]

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

[\*\* Agreement Not to Object to Evidence Offered \*\*]

I (and the Government) agree not to object to [service record documents, chain-of-custody documents, lab reports, etc...] being offered into evidence on the merits (in sentencing) on the basis of (hearsay, authenticity, etc.).

[\*\*Agreement on Admissibility of Classification Reviews\*\*]

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I agree to the admissibility, for any and all purposes, of any and all classification reviews and related affidavits of classified information of the loss or compromise of classified information pertaining to my case. I will not object to the assertion of the classified information privilege, M.R.E. 505, over the classified information pertaining to my case. I will not object to the military judge's consideration of the classification reviews and related affidavits, when formulating an appropriate sentence in this case. My defense counsel and I have been given the opportunity to review all classification review affidavits and concur that the matters therein are appropriate matters for consideration under R.C.M. 1001. I acknowledge I have had an adequate opportunity to consult with, and have so consulted with my defense counsel, regarding the meaning and ramifications of this term of the pretrial agreement.

(Remove loss/compromise language if case does not concern the loss/compromise of classified information but yet some evidence is classified)

[\*\*Agreement to Unclassified Forum and Record of Trial\*\*]

I agree that I will not seek to admit into evidence any classified information during any court proceeding of my case. By this paragraph, it is the parties' intent that all sessions of the court will be conducted in an unclassified forum. Additionally, it is the parties' intent that the record of trial will contain no classified information. As used in this agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 12958, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.2 and 1.3(e) of Executive Order 12958, or under any other Executive order or statute that requires protection for such information in the interest of national security. I acknowledge I have had an adequate opportunity to consult with, and have so consulted with my defense counsel, regarding the meaning and ramifications of this term of the pretrial agreement.

[\*\*Role of SECNAV in designated National Security Cases\*\*]

I have been fully advised by my defense counsel that my case has been designated a National Security Case under JAGMAN §0126. As required by JAGMAN §0137, the Convening Authority must request permission from the Secretary of the Navy to enter into this pretrial agreement. If the Convening Authority is unable to obtain permission from the Secretary of the Navy to enter into this pretrial agreement, then the provisions of this pretrial agreement will become null and void.

[\*\*Will not seek security clearance- Also in post-trial immunity section\*\*]

I also agree as further consideration for this agreement that I will not seek to obtain a national security clearance or access to classified information for a period of 10 years. I further agree that I will not seek employment requiring a national security clearance or requiring access to classified information for 10 years. As used in this agreement, classified information is marked or unmarked classified information, including oral communications, that is classified

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under the standards of Executive Order 12958, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.2 and 1.3(e) of Executive Order 12958, or under any other Executive order or statute that requires protection for such information in the interest of national security. Should I attempt to seek employment requiring a national security clearance or requiring access to classified information at any time after signing this agreement, but before I have completed serving the entire sentence (including any period of suspension or probation) as finally approved and executed, the convening authority may consider this misconduct and either unilaterally withdraw from the agreement, withdraw from the sentencing limitation provisions of the agreement, or vacate the suspended portions of punishment as allowed pursuant to the relevant stage of the case when the convening authority discovers the misconduct and takes action. I acknowledge I have had an adequate opportunity to consult with, and have so consulted with my defense counsel, regarding the meaning and ramifications of this term of the pretrial agreement.

[\*\* Conditional Plea(s) -- Only for Case Dispositive Issues \*\*]

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

[\*\* Confessional Stipulation \*\*]

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

[\*\* Agreement to Cooperate with Debriefing and Polygraph Prior to Entry of Pleas (MRE 410 protection)\*\*]

I understand that following approval of this pretrial agreement by the Convening Authority, but before I enter the guilty pleas set out in this agreement:

(1) I agree to submit to and cooperate in all debriefings, to include interviews and polygraph examinations, requested by the investigators specified by the Convening Authority, which interviews and polygraph examinations shall concern the loss or disclosure of any classified information for which I have knowledge or in any matter which my cooperation may be relevant. I understand that my cooperation shall extend to disclosing my knowledge of the actual or potential compromise of classified material or information by my or by any person or

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entity whatsoever. I also understand that these debriefings may also include questions typically asked in a polygraph examination for ascertaining if a person may continue to hold a Top Secret security clearance;

(2) I agree to answer all questions fully and completely, both orally and, where requested, in writing, to the best of my knowledge and belief. I will submit to as many debriefings, to include interviews and polygraph examinations, at such times and places as may be specified by the Convening Authority, as are necessary in the view of the Convening Authority, to ensure that I have made a full and truthful disclosure as to the above matters. I understand that my cooperation will extend for a period of 24 months from the date sentence is imposed on me;

(3) I agree to fully cooperate with investigators to resolve any issues arising from polygraph examination results indicating that I have provided deceptive or "no opinion" responses to any questions. I understand that such cooperation may extend to additional debriefings, to include interviews and polygraph examinations. I also understand that if I continue to provide deceptive or "no opinion" responses to any questions, based on the opinion of the polygraph examiner, that opinion and the responses shall be conveyed to the Convening Authority. I further understand that the Convening Authority may unilaterally withdraw from the pretrial agreement, rendering the entire agreement null and void, after considering all relevant information, including evidence uncovered by the ongoing investigation, other misconduct related to the theft, mishandling, and/or compromise of classified information that I admit during the interviews and/or polygraph examinations, and the examiner's opinion that I provided deceptive or "no opinion" responses to any questions and the basis for that opinion;

(4) I understand that any communication made by me during any debriefing, interview or polygraph examination conducted pursuant to this paragraph of this pretrial agreement are statements made in the course of plea discussions under Military Rule of Evidence 410. I understand that these statements are not admissible at court-martial, except as specifically provided for in Military Rule of Evidence 410.

(5) I agree to complete the polygraph rights waiver form pursuant to DoD Directive 5210.48 and DoD Regulation 5210.48-R prior to taking a polygraph examination referred to above. Although my only obligation under this provision is to complete the polygraph rights waiver form, I understand that should I not give my consent to the polygraph on the rights waiver form, my failure to cooperate may permit the Convening Authority to unilaterally withdraw from this pretrial agreement.

(6) I understand that my defense counsel shall be provided notice and a reasonable opportunity to be present during interviews and at the time of polygraph examinations required by this agreement, but will not be in the examination room during the polygraph examinations referred to above.

[\*\*Agreement to Cooperate with Debriefing and Polygraph After Entry of Pleas, but Before Sentencing (Testimonial Immunity)\*\*]

I. I agree, along with the Government, to request that sentencing in my case be delayed for sixty (60) days after the entry of pleas in order to conduct post-provency debriefings, to include interviews and polygraph examinations. I agree that this delay will be excluded from

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government accountability for purposes of a speedy trial. I further understand that I will be granted testimonial immunity and given an order to cooperate completely with those federal law enforcement authorities and other federal government officials as may be designated by the Convening Authority in any matter as to which my cooperation may be relevant. Following my receipt of testimonial immunity and the order by the Convening Authority referred to above:

(1) I agree to submit to and cooperate in all debriefings, to include interviews and polygraph examinations, requested by the investigators specified by the Convening Authority, which interviews and polygraph examinations shall concern the loss or disclosure of any classified information for which I have knowledge or in any matter which my cooperation may be relevant. I understand that my cooperation shall extend to disclosing my knowledge of the actual or potential compromise of classified material or information by my or by any person or entity whatsoever. I also understand that these debriefings may also include questions typically asked in a polygraph examination for ascertaining if a person may continue to hold a Top Secret security clearance;

(2) I agree to answer all questions fully and completely, both orally and, where requested, in writing, to the best of my knowledge and belief. I will submit to as many debriefings, to include interviews and polygraph examinations, at such times and places as may be specified by the Convening Authority, as are necessary in the view of the Convening Authority, to ensure that I have made a full and truthful disclosure as to the above matters;

(3) I agree to fully cooperate with investigators to resolve any issues arising from polygraph examination results indicating that I have provided deceptive or "no opinion" responses to any questions. I understand that such cooperation may extend to additional debriefings, to include interviews and polygraph examinations. I also understand that if I continue to provide deceptive or "no opinion" responses to any questions, based on the opinion of the polygraph examiner, that opinion and the responses shall be conveyed to the Convening Authority. I further understand that the Convening Authority may unilaterally withdraw from the pretrial agreement, rendering the entire agreement null and void, after considering all relevant information, including evidence uncovered by the ongoing investigation, other misconduct related to the theft, mishandling, and/or compromise of classified information admitted to by me in the interviews and/or polygraph examinations, and the examiner's opinion that I provided deceptive or "no opinion" responses to any questions and the basis of that opinion;

(4) My defense counsel shall be provided notice and a reasonable opportunity to be present for each and every interview and polygraph examination, but shall not be in the polygraph examination room itself;

(5) I understand that the Convening Authority shall provide me with a grant of testimonial immunity for any information I provide to government agents during debriefings, including interviews and polygraph examinations, conducted pursuant to this agreement;

(6) I agree to complete the polygraph rights waiver form pursuant to DoD Directive 5210.48 and DoD Regulation 5210.48-R prior to taking a polygraph examination referred to above. Although my only obligation under this provision is to complete the polygraph rights waiver form, I understand that should I not give my consent to the polygraph on the rights waiver form, I still may be found in violation of a different portion of this agreement because of my failure to cooperate. I also understand that because of the grant of immunity I will be given

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by the convening authority, I am not able to invoke the privilege against self-incrimination provided for on the polygraph rights waiver form. I understand that though I may have the right to consult with counsel as provided for on the polygraph rights waiver form, I also understand that I remain obligated under this agreement to cooperate fully and completely in answering all questions put to me during any polygraph that I am administered as part of this agreement.

[\*\*Agreement to Cooperate with Debriefing and Polygraph After Sentencing (Testimonial Immunity)\*\*]

1. I understand that after trial by court-martial, I will be granted testimonial immunity and given an order to cooperate completely with those federal law enforcement authorities and other federal government officials as may be designated by the Convening Authority in any matter as to which my cooperation may be relevant. Following my receipt of testimonial immunity and the order by the Convening Authority referred to above:

(1) I agree to submit to and cooperate in all debriefings, to include interviews and polygraph examinations, requested by the investigators specified by the Convening Authority, which interviews and polygraph examinations shall concern the loss or disclosure of any classified information for which I have knowledge or in any matter which my cooperation may be relevant. I understand that my cooperation shall extend to disclosing my knowledge of the actual or potential compromise of classified material or information by my or by any person or entity whatsoever. I also understand that these debriefings may also include questions typically asked in a polygraph examination for ascertaining if a person may continue to hold a Top Secret security clearance;

(2) I agree to answer all questions fully and completely, both orally and, where requested, in writing, to the best of my knowledge and belief. I will submit to as many debriefings, to include interviews and polygraph examinations, at such times and places as may be specified by the Convening Authority, as are necessary in the view of the Convening Authority, to ensure that I have made a full and truthful disclosure as to the above matters. I understand that my cooperation will extend for a period of 24 months from the date sentence is imposed on me;

(3) I agree to fully cooperate with investigators to resolve any issues arising from polygraph examination results indicating that I have provided deceptive or "no opinion" responses to any questions. I understand that such cooperation may extend to additional debriefings, to include interviews and polygraph examinations. I also understand that if I continue to provide deceptive or "no opinion" responses to any questions, based on the opinion of the polygraph examiner, that opinion and the responses shall be conveyed to the Convening Authority;

(4) I understand that if information is given to the Convening Authority indicating that I have violated the provisions of subparagraphs "(1)", "(2)", or "(3)" of paragraph "1" of this agreement after trial but prior to his having taken action on the record of trial, the Convening Authority may, after first complying with notice and hearing requirements consistent with Article 72, UCMJ and R.C.M. 1109, withdraw from the sentence limitation provisions of this agreement. I further understand that should the Convening Authority withdraw from the sentence limitation provisions of this agreement that any provisions in the pretrial agreement relating to suspension of any aspect of my sentence would become null and void in all respects,

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and that the entire sentence adjudged at my court-martial may be approved and imposed upon me;

(5) I understand that if information is given to the Convening Authority that I have violated the provisions of subparagraphs “(1)”, “(2)”, or “(3)” of paragraph “1” after the date of the Convening Authority's action, but before I have completed serving the entire sentence (including any period of suspension or probation) as finally approved and executed, the Convening Authority may, after complying with the procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed to in this pretrial agreement or as otherwise approved by the Convening Authority. I understand that should the convening authority take such action, the previously suspended portion of my sentence could be imposed upon me;

(6) I understand that I will be entitled to present evidence based on a polygraph examination from an independent source if, during a hearing conducted pursuant to subparagraphs “(4)” or “(5)” of paragraph “1,” the Convening Authority wants to consider the results of polygraph examinations, including a polygraph examiner's opinion that I provided “no response” or deceptive responses and the basis for those opinions. I understand that if I elect to have such an examination, the Convening Authority has agreed to pay for one (1) alternative polygraph examination from an independent source. I also understand that the independent source polygrapher must hold, or be able to gain, the necessary security clearance in accordance with current regulations. I agree that the results and charts of any independent polygraph examination paid for by the Convening Authority will be forwarded to the Convening Authority for his review;

(7) I understand that the Convening Authority shall provide me with a grant of testimonial immunity for any information I provide to government agents during debriefings, including interviews and polygraph examinations, conducted pursuant to this agreement;

(8) I agree to complete the polygraph rights waiver form pursuant to DoD Directive 5210.48 and DoD Regulation 5210.48-R prior to taking a polygraph examination referred to above. Although my only obligation under this provision is to complete the polygraph rights waiver form, I understand that should I not give my consent to the polygraph on the rights waiver form, I still may be found in violation of a different portion of this agreement because of my failure to cooperate. I also understand that because of the grant of immunity I will be given by the convening authority, I am not able to invoke the privilege against self-incrimination provided for on the polygraph rights waiver form. I understand that though I may have the right to consult with counsel as provided for on the polygraph rights waiver form, I also understand that I remain obligated under this agreement to cooperate fully and completely in answering all questions put to me during any polygraph that I am administered as part of this agreement.

I understand that I have a continuing obligation to safeguard classified information, including the information I previously disclosed, lost, or compromised.

PLEAS OF THE ACCUSED

CHARGE

PLEAS

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

[\*\* Examples of Pleas w/exceptions and substitutions\*\*]

Spec \_\_: Unauthorized absence terminated by apprehension. Guilty, except for the words “terminated by apprehension”; of the excepted words, Not Guilty; of the Specification as excepted, Guilty.

Spec: \_\_: Between 22 Jun and 29 Jun 03, at an unknown location, wrongfully use cocaine. Guilty, except for the words “unknown location” substituting therefor the words “Norfolk, Virginia”; of the excepted words, Not Guilty; of the substituted words, Guilty; of the Specification as excepted and substituted, Guilty.

Charge \_\_: Violation of Art 123a Not Guilty, but guilty of a violation of Article 134.

Spec \_\_: Uttering checks w/out sufficient funds Not Guilty, but guilty to the LIO of dishonorable failure to maintain funds.

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

\_\_\_\_\_  
(Rate/Rank, Name, Service), Accused Date

\_\_\_\_\_  
(Rank, Name, Service), Defense Counsel Date

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

\_\_\_\_\_ Date  
(Rank, Name, Service of Convening Authority)  
(Title of Convening Authority)

DEPARTMENT OF THE NAVY  
(GENERAL/SPECIAL) COURT-MARTIAL  
NAVY AND MARINE CORPS TRIAL JUDICIARY  
( ) JUDICIAL CIRCUIT

U N I T E D S T A T E S

v.

(NAME OF ACCUSED)  
RATE/RANK USN/USMC

MEMORANDUM  
OF  
PRETRIAL AGREEMENT:  
(Part II)  
SENTENCE LIMITATIONS

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

[PARAGRAPH 1. Punitive Discharge]

1. Punitive Discharge: May be approved as adjudged.

[OR – Mitigate DD to BCD – GCMs only]

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

[OR – Disapprove any punitive discharge]

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

[OR – Suspend the discharge for specified number of months after CA's action or other specified event]

1. Punitive Discharge: May be approved as adjudged. However, if a punitive discharge is adjudged, it will be suspended (for a period of \_\_\_\_\_ months/years from the date of trial/the convening authority's action)(until a specific date or event, such as EAOS or ADSEP completion)), at which time, unless sooner vacated, the suspended punitive discharge will be remitted without further action.

[PARAGRAPH 2: Confinement]

2. Confinement: May be approved as adjudged.

[OR – Disapprove Confinement]

2. Confinement: If adjudged, any confinement will be disapproved.

[OR – Place a cap on confinement with the excess suspended]

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2. Confinement: May be approved as adjudged. However, all confinement in excess of \_\_\_\_ days/months/years will be suspended for the period of \_\_\_\_\_ months/years from the date of trial/date of the convening authority's action, at which time, unless sooner vacated, the suspended portion will be remitted without further action. This Agreement constitutes my request for, and the convening authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement and deferment for the days of "good time" (as defined by SECNAVINST 1640.9B) that I might earn while in confinement prior to the convening authority taking action on the sentence. The period of deferment will run from the date of sentencing until the date the convening authority acts on the sentence.

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

2. Confinement: May be approved as adjudged. However, if a punitive discharge is adjudged and I request voluntary appellate leave, all confinement in excess of \_\_\_\_\_ days/months/years/time served will be suspended for a period of \_\_\_\_\_ months/years from the date of trial/date of the convening authority's action, at which time, unless sooner vacated, the suspended portion will be remitted without further action. This Agreement constitutes my request for, and the convening authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement and deferment for the days of "good time" (as defined by SECNAVINST 1640.9B) that I might earn while in confinement prior to the convening authority taking action on the sentence. The period of deferment will run from the date of sentencing until the date the convening authority acts on the sentence.

[Paragraph 3. Forfeiture and Fines]

3. Forfeiture or Fines: May be approved as adjudged.

[Or - Disapproval all adjudged and defer/waive all automatic]

a. Adjudged Forfeiture: All adjudged forfeiture will be disapproved.

b. Automatic Forfeiture: Automatic forfeiture (in the amount of \$\_\_\_\_\_ per month) will be deferred provided that the accused establishes and maintains a dependent's allotment in the total amount of the deferred forfeiture amount during the entire period of deferment. This Agreement constitutes the accused' request for, and the convening authority's approval of, deferment of automatic forfeiture (in the amount of \$\_\_\_\_\_ per month) pursuant to Article 58b(a)(1), UCMJ. The period of deferment will run from the date automatic forfeiture would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the convening authority acts on the Sentence. Further, this Agreement constitutes the accused' request for, and the convening authority's approval of, waiver of automatic forfeiture (in the amount of \$ \_\_\_\_\_ per month). The period of waiver will run from the date the convening authority takes action on the sentence for six months. The deferred and waived forfeiture shall be paid to \_\_\_\_\_, who is my dependent.

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c. Fines: If adjudged, the fine will be disapproved.

[OR - Suspend adjudged and defer/waive automatic]

a. Adjudged Forfeiture: May be approved as adjudged, however adjudged forfeiture (in the amount of \$\_\_\_\_\_ pay per month for \_\_\_\_\_ months) will be suspended for \_\_\_\_\_ months from the date of the convening authority's action, at which time, unless sooner vacated, all suspended adjudged forfeiture will be remitted without further action. This Agreement constitutes the accused' request for, and the convening authority's approval of, deferment of all adjudged forfeiture (in the amount of \$\_\_\_\_\_ pay per month for \_\_\_\_\_ months), which are to be suspended pursuant to the terms of this Agreement and would otherwise become effective under Article 57(a)(1), UCMJ. The period of deferment will run from the date adjudged forfeiture would otherwise become effective until the date of the convening authority's action.

b. Automatic Forfeiture: Automatic forfeiture (in the amount of \$ \_\_\_\_\_ per month) will be deferred provided that the accused establishes and maintains a dependent's allotment in the total amount of the deferred forfeiture amount during the entire period of deferment. This Agreement constitutes the accused' request for, and the convening authority's approval of, deferment of automatic forfeiture (in the amount of \$ \_\_\_\_\_ per month) pursuant to Article 58b(a)(1), UCMJ. The period of deferment will run from the date automatic forfeiture would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the convening authority acts on the sentence. Further, this Agreement constitutes the accused' request for, and the convening authority's approval of, waiver of automatic forfeiture (in the amount of \$ \_\_\_\_\_ per month). The period of waiver will run from the date of the convening authority's action and shall not exceed six (6) months. The deferred and waived forfeiture shall be paid to \_\_\_\_\_, who is my dependent.

[or, Automatic Forfeiture not impacted by the agreement]

b. Automatic Forfeiture: I understand that this agreement does not affect automatic forfeiture of pay and allowances, which may be imposed in accordance with Article 58b, UCMJ.

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

[OR - fine will be mitigated to forfeiture]

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

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[Paragraph 4. Reduction]

4. Reduction: May be approved as adjudged.

[OR - Disapprove adjudged/remit automatic]

4. Reduction:

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

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

[OR - Suspend adjudged and automatic]

4. Reduction:

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

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

[OR - Automatic Reduction not impacted by agreement]

b. Automatic Reduction: I understand that this agreement does not affect automatic reduction in pay grade, which may be imposed in accordance with Article 58a, UCMJ, and Section 0152 of the Manual of the Judge Advocate General (JAGMAN).

[Paragraph 5. Other lawful punishments]

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

[OR – Disapprove other lawful punishments]

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

[OR - Suspend other lawful punishments]

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

[Paragraph 6. “Bareback” Special Provision – Special Courts-Martial Only]

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

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

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

(NAME OF ACCUSED)  
RATE/RANK USN/USMC

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

Name of Counsel

Rank USN/USMC

The foregoing pretrial agreement is approved.

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

“by direction”) (Convening authority signature, or signature of authorized individual acting

**APPENDIX 11-B**

**18 U.S.C. 793 Providency & Element Breakdown**

Discussion. This Appendix focuses on the federal espionage statute, 18 U.S.C. § 793. Subsections (a) through (f) describe six distinct offenses, each involving the same legal principles and definitions. The text of the statute is provided in enclosure (1). It is from this text that the military judge formulates the providence inquiry.

a. Elements. The statute is rather wordy, in order to foreclose potential loopholes. For example, instead of just referring to “information,” the statute specifies several formats, such as “publication,” “code book,” “sketch,” etc. The statute is also written to expressly cover attempts. However, the text is actually very straightforward when broken down into elements. Enclosure (2) provides a useful guide as to how the text of each subsection may be parsed into elements. It is not intended to be an authoritative source. A sample specification of a section 793(e) offense is provided in Enclosure (3).

b. Definitions. Once the text of the statute is broken down and organized into elements, crafting the providence inquiry becomes a more familiar task. As with any other case, the military judge must explain to the accused the legal definitions of the terms used in the elements. Most of the terms in this statute are self-explanatory, but some require discussion. The following terms are relevant to all offenses under section 793.

(1) National Defense. The information (document, writing, etc.) must relate to the national defense. Note that the statute makes no requirement for the information to be classified. To meet the definition of national defense information, the information must relate to the national defense and not be publicly available. The first prong of the definition, “relating to the national defense,” is fairly broad. It refers to any operations of the military departments and other activities related to national preparedness. The second prong is more limiting. Information that is lawfully accessible to the public, whether or not conveniently accessible, does not meet this definition. In this context, the classification of the information can be relevant. Although not required by the statute, the fact that information is classified shows that the government has taken steps to protect it. It can also show that the accused had knowledge of the protected nature of the information. This may be helpful in the context of the providence inquiry when questioning the accused about his or her knowledge and intent. If the accused can admit that he knew the information was formally classified, and can articulate a reasonable connection to national defense, this element would be satisfied.

(2) Foreign Country. The statute is violated if the information is intended to be used, or merely could be used, to the injury of the United States or to the advantage of a foreign country. First, it should be noted that this is an either/or requirement. The element is satisfied if the information could be used to the advantage of a foreign nation, regardless of injury to the United States. The accused need not have any intent, or even reason to believe, that injury to the United States could result. Second, it is not required that the subject foreign nation be an enemy of the United States. The statute is violated even if the foreign nation is considered an ally. Under some circumstances, that may have a mitigating effect on the sentence, but it is not a defense. In

the context of the providence inquiry, this can be significant, especially in cases arising under sections 793(d) and (e). It may be easier for an accused to admit that the information could be used to the advantage of a foreign country that is an ally, than to admit anything having to do with injury or possible injury to the United States.

**18 USCS § 793 (2006)**

**§ 793. Gathering, transmitting, or losing defense information**

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or

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attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense,

(1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or

(2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(h)

(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ([21 U.S.C. 853 \(b\)](#)), (c), and (e)–(p) shall apply to—

(A) property subject to forfeiture under this subsection;

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(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection.

(4) Notwithstanding section [524 \(c\)](#) of title [28](#), there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

**ELEMENTS OF 18 U.S.C. § 793 OFFENSES**

**793(a)**

(1) The accused went upon {entered, flew over, etc.} a vessel {aircraft, fort, etc.} with intent to obtain national defense information;

(2) The vessel {aircraft, fort, etc.} was related to the national defense;

(3) The accused acted with the intent or with reason to believe that information obtained was to be used to the injury of the United States, OR, to the advantage of a foreign country.

**793(b)**

(1) The accused copied {took, obtained, attempted to take, etc.} a document {sketch, photograph, etc.};

(2) The document {sketch, photograph, etc.} was related to the national defense;

(3) The accused acted with the intent or with reason to believe that the document {sketch, photograph, etc.} was to be used to the injury of the United States or to the advantage of a foreign country.

**793(c)**

(1) The accused received {obtained, attempted to receive, etc.} from {name of the source} a document {sketch, photograph, etc.};

(2) The document {sketch, photograph, etc.} was related to the national defense;

(3) The accused acted knowing or having reason to believe that the document {sketch, photograph, etc.} had been or would be obtained by any person to the injury of the United States or to the advantage of a foreign country.

**793(d)**

(1) The accused had lawful possession of {access to, control over, etc.} a document {sketch, photograph, etc.};

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- (2) The document {sketch, photograph, etc.} was related to the national defense;
- (3) The accused had reason to believe the document {sketch, photograph, etc.} could be used to the injury of the United States or to the advantage of a foreign country;
- (4) The accused willfully communicated {delivered, attempted to deliver, etc.} the document {sketch, photograph, etc.} to {person}, who was not entitled to receive it, **OR**, willfully retains the document {sketch, photograph, etc.} and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.

**793(e)**

- (1) The accused had unauthorized possession of {access to, control over, etc.} a document {sketch, photograph, etc.};
- (2) The document {sketch, photograph, etc.} was related to the national defense
- (3) The defendant had reason to believe the document {sketch, photograph, etc.} could be used to the injury of the United States or to the advantage of a foreign country;
- (4) The accused willfully communicated {delivered, attempted to deliver, etc.} the document {sketch, photograph, etc.} to {person}, who was not entitled to receive it, **OR**, willfully retains the document {sketch, photograph, etc.} and fails to deliver it to the officer or employee of the United States entitled to receive it.

**793(f)**

- (1) The accused had authorized possession of {access to, control over, etc.} a document {sketch, photograph, etc.};
- (2) The document {sketch, photograph, etc.} related to the national defense;
- (3) The accused, through gross negligence, permitted the document {sketch, photograph, etc.} to be lost {stolen, destroyed, etc.}, **OR**, having knowledge the document {sketch, photograph, etc.} had been lost {stolen, destroyed, etc.}, failed to make prompt report of such to his superior officer

SAMPLE SPECIFICATION FOR 18 U.S.C. § 793(e)

**CHARGE:** Violation of the UCMJ, Article 134.

**Specification:** In that Electrician's Mate First Class \_\_\_\_\_, U. S. Navy, Navy Submarine Training Center Pacific Detachment San Diego, California, on active duty, did, at or near San Diego, California, on divers occasions between on or about 1 July 20\_\_ and on or about 15 July 20\_\_, having unauthorized possession of documents and material relating to the National Defense, willfully and unlawfully retain said documents and materials and fail to deliver the said documents and materials to the officer or employee of the United States entitled to receive them, in violation of Title 18, United States Code, Section 793(e).