A View from the Bench

The Guilty Plea—Traps for New Counsel

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Many of our civilian colleagues are often shocked to learn the exhaustive detail that accompanies a guilty plea inquiry in courts-martial practice. They are unaware that unique limitations restrict an accused's ability to plead guilty, and require the military judge and counsel to assume a much more active role. While Article 45 of the Uniform Code of Military Justice affords an accused a right to plead guilty, it also requires the court to enter a plea of not guilty for an improvident accused.[1] Rule for Courts-Martial (RCM) 910(e) also dictates that the military judge shall refuse to accept an untruthful or improvident plea.[2] In order to determine the accuracy of the guilty plea, the military judge must personally discuss each element of the offense, and the accused must also admit facts which objectively support his plea.[3] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[4]

Military judges are generally afforded wide discretion in deciding whether to accept an accused's guilty plea.[5] However, if the accused reasonably raises a potential defense or other matter inconsistent with his guilty plea, "it [is] incumbent upon the military judge to make a more searching inquiry to determine the accused's position on the apparent inconsistency."[6] Military judges appreciate counsel who have thoroughly prepared their clients for providency and recognize potential problems before the court-martial begins.

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[1] UCMJ art. 45 (2008).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2008) [hereinafter MCM].

[3] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969): MCM, *supra* note 2, R.C.M. 910. This rule provides as follows:

> (c) *Advice to accused*. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:
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> (1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;
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> (2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;
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> (3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;
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> (4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and
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> (5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.
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> (d) *Ensuring that the plea is voluntary*. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.
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> (e) *Determining accuracy of plea*. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

Id.; *see also Care*, 40 C.M.R. 247.

[4] United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996).

[5] *See* United States v. Gallegos, 41 M.J. 446 (C.A.A.F. 1995); United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Phillippe, 63 M.J. 307 (C.A.A.F. 2006).

[6] *See* United States v. Timmins, 45 C.M.R. 249, 253 (C.M.A. 1972).

Guilty pleas can contain more traps for the unwary than contested courts-martial. This is important for the practitioner because guilty pleas comprise the vast majority of current courts-martial practice and improvident pleas could result in reversal.[7] It is not uncommon for new trial and defense counsel to sit as lead chair the first week on the job. To help counsel avoid trying the case twice, this note contains observations from one military judge of some of the more common issues that arise during guilty plea proceedings.

Inexperienced Counsel and Unique Procedures in Guilty Pleas

Ostensibly straightforward guilty pleas present a plethora of issues at the trial and appellate levels. This occurs for two reasons: first, counsel's experience level, and second, the unique procedures and requirements attendant in military guilty pleas.

In the civilian legal community, new law school graduates sometimes wait years to gain courtroom experience. Military counsel, however, are expected to immediately walk into court and represent clients in serious felony cases, while simultaneously trying to master the Military Rules of Evidence (MRE) and the unique procedures and requirements set forth in the RCM.

There is nothing inherently wrong with being inexperienced—as the old saying goes: there is a reason they call it the "practice" of law. Learning to apply the MRE and the RCM takes practice and time in an authentic environment—an actual trial, with an actual judge, an actual accused, and an actual opposing counsel. Counsel new to military trial practice must realize that, while they "know what they know," more often they "don't know what they don't know."[8] Those who are willing to admit to their inexperience level are often more receptive to advice, and work more diligently than their counterparts.

Another reason we often encounter problems with guilty pleas is because counsel frequently underestimate the difficulty of a "straightforward" guilty plea. Defense counsel new to criminal law may be more inclined to overlook pertinent defenses and spend too little time preparing the client for providency. New defense counsel may even encourage an accused to plead guilty when it is not in his best interest to do so.[9] Similarly, new trial counsel can clutter the charge sheet with minor offenses that would be better addressed through administrative separation[10] or Article 15 proceedings.[11] Trial counsel also often squander the opportunity to present a meaningful stipulation of fact that will actually assist the fact finder, and instead end up offering a document that is nothing more than an a recitation of legal conclusions. From the beginning of the investigation, both trial and defense counsel must take the time to fully prepare for the possible guilty plea.

Pretrial Tips for Inexperienced Trial Counsel

First— have a plan**.** Before preferring the charges, it is important that trial counsel strategically determine what to exclude**.** In order to do this, the government must have a fully developed theory of its case. Then charge only what is required to do justice, elicit the government's theory of the case, and address the gravamen of the alleged misconduct—not any and everything that can possibly be called an offense.

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[7] In Current Year 2006, the ratio of the 1358 courts-martial was approximately 75% guilty pleas and 25% contested. Telephone Interview with Mr. Squires, Clerk of Court/Judicial Advisor, to the U.S. Army Court of Crim. Appeals, in Washington, D.C. (Oct. 31, 2008).

[8] *See* Newsbrief, Donald H. Rumsfeld, Sec'y of Defense (Feb. 12, 2002) (transcript available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636).

> Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.

Id.

[9] In such cases, the military judge will hopefully find the accused's pleas improvident. As has been noted by numerous military trial judges in post-trial sessions with counsel, it is not the military judge's duty to get the accused across the guilty plea "finish line."

[10] *See* U.S. DEPT. OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005); U.S. DEPT. OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

[11] *See* UCMJ art. 15 (2008); U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005).

Second—be careful what you charge. In most cases, the more charges on a charge sheet, the better chance to obfuscate the issues and create greater opportunities for appellate error. For example, on a basic training post there are multiple ways for new recruits to fall into disfavor with their drill sergeant. Often, an accused facing trial at such an installation will have committed many offenses. In such a scenario, should the trial counsel charge every possible "crime" the accused has committed, such as all past failures to repair, every regulatory violation, and each disrespect and disobedience offense? Or should the trial counsel charge only the more serious offenses that are "driving the train?" If counsel chooses the former, not only will the providence inquiry continue *ad infinitum,* but issues of import will sink into obscurity.

Third—make the pretrial agreement do your work for you. Pretrial agreements should be tailored to the case and omit unnecessary language. For example, if defense counsel knows there are no motions in the case, they should omit the provision that requires the accused to "waive all waivable motions." Likewise, if there is only one charge and specification, counsel should not add a "savings clause" that the pretrial agreement is not affected if the military judge dismisses an offense. The quantum portion, likewise, should be concise, and include only the limitation on sentence. Eliminate superfluous language, such as reiteration of the terms of the pretrial agreement.

Stipulations of Fact[12]

Well-written stipulations of fact advance the judicial process in guilty pleas. Military judges use well-written and informative stipulations of fact in preparation for and during the providence inquiry. Unfortunately, in many cases, trial counsel introduce stipulations which contain few facts and circumstances about the offense(s), no personal information about the accused, and merely regurgitate legal conclusions.

By definition, a stipulation of fact should contain factual information about the particular offense, not conclusions of law.[13] Though trial counsel should include each element of each offense in the stipulation of fact, it should transcend the mere recitation of legal conclusions and should detail facts that support the accused's guilty plea. For example, instead of saying "the accused acted with negligence when he discharged the firearm" the stipulation should contain what facts support the conclusion that the accused's conduct was negligent. In other words, it should explain why this particular act is a crime.

Throughout the process of preparing the stipulation, trial counsel should deliberately view the case from a defense perspective and anticipate potential impediments to the accused's guilty plea. The trial counsel should review the evidence again, and reread the accused's confession, along with all the witness statements. What might the accused have difficulty admitting? What are some of the potential defenses in the case? An effective trial counsel will include the facts about these issues in the stipulation of fact. Well-written, useful stipulations detail the accused's confession, include facts from the police reports, and extract credible, informative facts from witness statements. Another advantage of a well-written stipulation of fact is that it alerts the military judge to potential issues that may arise. A military judge may well identify a legal grenade that neither counsel has anticipated—and be able to rectify the problem prior to trial.[14]

As a condition to accepting the pretrial agreement, the convening authority may also require the defense to agree to include in the stipulation aggravating circumstances relating to the offense to which the accused has pled guilty.[15] In appropriate cases, the government may then choose to present only the stipulation of fact and forego the presence of sentencing witnesses, saving time and money.

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[12] *See* MCM, *supra* note 2, R.C.M. 811.

[13] *See* United States v. Sweet, 42 M.J. 183, 185 C.A.A.F. 1995).

> We acknowledge that a more detailed inquiry in many instances may be advisable *or even necessary* in order to resolve questions surrounding the providence of pleas. Here, however, we take into consideration that appellant is an officer who was represented by qualified counsel, *that appellant agreed to a stipulation of fact which describes his criminal acts in detail, and that his "yes" and "no" answers to the military judge's inquiry responded to questions of fact and not conclusions of law.* Thus, we are persuaded to agree with the Court of Military Review that the "facts contained in the stipulation along with the inquiry of appellant on the record fully support the military judge's determination that a factual basis existed for those pleas." . . . We therefore hold that the military judge's inquiry satisfied the requirements of *Care* and RCM 910.

Id. at 185–86 (second emphasis added).

[14] *See* MCM, *supra* note 2, R.C.M. 802. Many issues can be resolved outside the courtroom, with the wise counsel of the military judge.

[15] *See id.* R.C.M. 1001(b)(4) (allowing the prosecution to introduce evidence in aggravation "directly relating to or resulting from the offenses of which the accused has been found guilty").

Not All Cases Should be Plead Out

Defense attorneys must plan on spending a lot of time with clients interviewing, closely listening to, and rehearsing guilty pleas. Defense counsel new to military criminal practice will quickly find out there is no such thing as a "simple" guilty plea. Though this may be stating the obvious, defense counsel must learn their craft. This requires researching case law, reading the *Manual for Courts-Martial* and the *Crimes and Defenses Deskbook*,[16] and watching other counsel in the courtroom.

After carefully examining the specifications, defense counsel should first determine whether it is in the accused's best interest to even plead guilty. Though the accused may come to his defense counsel eager to confess wrongdoing, and might well have engaged in *some* misconduct, it may be extremely difficult for the government to prove its case. Additionally, while the accused may have committed the charged offense, he may have an affirmative defense.[17] In such cases, though it is ultimately the accused's decision whether to plead guilty,[18] counsel might advise him to plead not guilty. In such cases, though it is ultimately the accused's decision whether to plead guilty,[19] counsel might advise him to plead not guilty. For example, in a reckless driving case, the defense counsel should research statutes and case law and determine if the facts of the case support such a charge. Was the accused's driving actually reckless, or simply negligent?

Also, when determining whether to advise the accused to plead guilty, defense counsel must ferret out all potential defenses—having spent the required time *in advance of trial* explaining these defenses to the accused. Advising the accused of possible defenses also means that counsel, and the military judge during the providence inquiry, must give the accused accurate and thorough information concerning the defense, because "where an accused is misinformed as to possible defenses, a guilty plea must be set aside."[20] If the judge first learns about the defense during the *Care*[21] inquiry or during the sentencing phase after entering findings, then the judge is obligated to conduct further inquiry if the accused's statements raise matters "inconsistent with the plea."[22]

Specific Intent Crimes

In determining potential defenses, the most important thing for defense counsel to do is read the charge sheet. Specific intent crimes should be analyzed separately from general intent crimes and defense counsel should anticipate problems with specific intent offenses, such as a voluntary intoxication defense. For example, in *United States v. Metivier*[23] the accused had no trouble pleading guilty to being drunk on duty and driving a five ton truck while drunk, but he raised the defense of voluntary intoxication when he pled guilty to willfully discharging a firearm as to endanger human life when he told the military judge during his unsworn statement: "[T]he whole thing would have—been happened differently if we hadn't been drinking, Your Honor."[24] The Army Court of Criminal Appeals found the military judge erred by not reconciling this apparent inconsistency.[25] The court stated that voluntary intoxication is raised as a defense when there is "'some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary

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[16] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (Feb. 2008), *available at* https://www.jagcnet.army.mil/8525744700446A95 (follow "2008 Crimes & Defenses Desk Book.pdf" hyperlink).

[17] *See* MCM, *supra* note 2, R.C.M. 916. Also known as "special defenses," the accused does not deny he committed one or more of the acts constituting the offense charged, but he "denies, wholly or partially, criminal responsibility for those acts." *See id.* R.C.M. 916 discussion. These defenses include the defenses of justification, obedience to orders, self-defense, accident, entrapment, coercion or duress, inability, ignorance or mistake of fact and lack of mental responsibility. *Id.*

[18] *See id.* R.C.M. 910.

[19] *See id.*

[20] United States v. Zachary, 63 M.J. 438, 444 (C.A.A.F. 2006).

[21] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (establishing the principles for the modern guilty plea inquiry).

[22] United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

[23] United States v. Metivier, No. 20050615 (A. Ct. Crim. App. July 24, 2007) (memorandum opinion).

[24] *Id.* at 4.

[25] *Id.* at 2.

intent, not just evidence of mere intoxication."[26] The accused's unsworn statement was "some" evidence. The court dismissed the specification.[27] If defense counsel should encounter a similar situation, he should tell the judge that he has discussed the defense of voluntary intoxication with his client and that it does not apply in the case. The judge should then ensure that the accused understands the defense, and elicit specific facts as to why it does not apply.

Many a guilty accused has come into the courtroom ill-prepared for the questioning that he will get from the military judge on the specific intent element of the charged offense. Most are quick to respond "yes" when queried on the specific intent requirement, however, upon further questioning, the accused backtracks, rationalizes, and often posits an explanation or excuse, incorrectly believing that the judge has become his advocate. These situations, and "day of trial defenses," hitherto unknown to defense counsel, often evince a lack of time spent with a client and a failure to adequately prepare for trial.

Sanity and Sentencing

In some cases, problems may arise after the accused has successfully entered pleas of guilty, and then raises a mental responsibility or diminished capacity issue during the sentencing portion of the trial. Mental health issues bear special status in the military, especially today where many soldiers facing courts-martial have served multiple tours in Iraq and Afghanistan.[28] Combat situations can create or aggravate mental health issues. If the accused's comments about his condition are "passing observations" and raise only a "mere possibility" of a defense,[29] then perhaps the military judge need not re-open the providency and conduct further examination on the sanity issue. However, whether further inquiry "is required as a matter of law is a contextual determination."[30]

For example, one common way this scenario occurs is when the accused, in an unsworn statement, tells the judge "I was diagnosed with bi-polar [disorder] and that is when I started to get in trouble."[31] In such cases, the defense counsel should know that there is going to be a potential issue to resolve, and alert the military judge before this occurs. Judges do not like being surprised with a sanity issue after the accused has survived providency. If defense counsel has researched the issue and advised the accused that mental responsibility or diminished capacity is not a defense in this case, then the defense counsel should so inform the military judge. If defense counsel has not discussed or advised the accused at all, the military judge may have to re-open the inquiry, and must also "determine whether to order psychological testing by a sanity board."[32]

Stipulations of Fact and the Defense

What can the defense do with stipulations of fact? Though in most jurisdictions trial counsel draft the stipulation of fact, nothing prohibits defense counsel from offering a draft stipulation. Defense counsel can express facts from the defense perspective, inserting extenuating and mitigating evidence where appropriate. The defense counsel may even offer to forego live witness testimony if the trial counsel agrees to include extenuating and mitigating information in the stipulation. This option is especially attractive to trial counsel who labor under a limited budget and are trying to save money. Bottom line, trial counsel and defense counsel are allowed and encouraged to be reasonable with each other at all stages of the trial process and the stipulation of fact is no exception.

Counsel's Joint Responsibility

Trial and defense counsel both have a responsibility to assist the court by listening to the military judge's questions, taking notes, and asking the judge to follow-up on particular questions that bear further inquiry. Judges sometimes prepare

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[26] *Id.* at 3 (quoting United States v. Peterson, 47 M.J. 231, 233–34 (C.A.A.F. 1997) (citation omitted)).

[27] *Id.* at 5.

[28] *See* United States v. Shaw, 64 M.J. 460 (C.A.A.F. 2007). Combat, itself, may cause or aggravate certain mental illnesses. *See also* MCM, *supra* note 2, R.C.M. 706, MIL. R. EVID. 302.

[29] United States. V. Phillippe, 63 M.J. 307 (C.A.A.F. 1991).

[30] *Shaw*, 64 M.J. at 464.

[31] *Id.*

[32] *Id.* at 465 (citing MCM, *supra* note 2, R.C.M. 706(a), R.C.M. 916(k)(3)(B)).

questions in advance of trial, and, in rare "off moments," miss something the accused said—or failed to say. Listening and asking the proper follow-up questions can make the difference during appellate review of the case. Counsel should note when the judge asks the accused to agree to a legal conclusion and then subsequently fails to obtain further factual details to support that conclusion. When this occurs, counsel should wait until the close of the inquiry and, when the judge asks whether either side desires further questioning on any offense, speak up at that time. The judge appreciates this attention to detail. Even when trial judges ask the accused a plethora of questions, the appellate courts can still find the accused's guilty plea to be improvident. It is therefore imperative that both sides listen to the accused's answers.

Conclusion

In sum, guilty pleas are often deceptively difficult. New counsel who find themselves representing or prosecuting an accused in a guilty plea case can be most effective if they know what to anticipate. Trial counsel must be reasonable, prepare a useful stipulation of fact and listen attentively during the providence inquiry for matters inconsistent with the accused's plea. Defense counsel should thoroughly research the legal issues, prepare for the providence inquiry and rehearse, rehearse, and rehearse—recognizing before trial when the accused is simply unable or unwilling to admit guilt. To do so should speed the transition from inexperienced counsel to polished litigators.