

**Everybody Cut Footloose¹:
Recent Developments in the Law of Court-Martial Personnel, Guilty Pleas, and Pretrial Agreements**

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*You're playing so cool
Obeying every rule
Dig way down in your heart
You're burning, yearning for some . . .
Somebody to tell you
That life ain't passing you by
. . . .
Lose your blues
Everybody cut footloose²*

I. Introduction

In the movie *Footloose*,³ big-city kid Ren moves to the small town of Bomont in the Midwest. He finds out the conservative town has banned dancing; as the town preacher explains to Ren: “Besides liquor and drugs, which seem to accompany such an event, the thing that distresses me even more, Ren is the spiritual corruption that can be involved. These dances and this kind of music can be destructive.”⁴ Ren realizes all the town needs is a dance and, with backing tracks from Kenny Loggins, he eventually convinces the town to let the high school kids have a dance just outside the town’s limits.⁵ It can be said without hyperbole that *Footloose* is the *Citizen Kane* of 1980s dance films, the magic of *Rebel Without a Cause* combined with the emotional gravitas of Frankie and Annette’s *Beach Party*.⁶ The movie is so profound, it has influenced appellate judges this term to cut loose (footloose) in a series of cases, finding that convening authorities will rarely be disqualified from referring cases, uncovering broad waivers in guilty plea cases, enforcing terms in pretrial agreements that favor the Government while also limiting the Government’s ability to withdraw from pretrial agreements, and reviewing records in guilty pleas with a view towards upholding the plea.

¹ FOOTLOOSE (Paramount 1984).

² *Id.* (lyrics by Kenny Loggins).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* But see Roger Ebert, Review, *Footloose*, Jan. 1, 1984, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19840101/REVIEW/401010339/1023#> (last visited Nov. 13, 2009) (writing that “‘Footloose’ is a seriously confused movie that tries to do three things, and does all of them badly”; specifically, the film “wants to tell the story of a conflict in a town, it wants to introduce some flashy teenage characters, and part of the time it wants to be a music video”).

II. “Jump Back!”: Convening Authority Disqualification

After Ren starts school at Bomont, he talks to another student who reveals the town has criminalized dancing:

Willard: You won’t get any of that here.
Ren: What’s that?
Willard: Dancing. There’s no dancing.
Ren: Why?
Willard: It’s illegal.
Ren: Jump back!⁷

Ren is so shocked that he coins his own catchphrase. This term, the CAAF considered whether a convening authority was disqualified from referring a case to trial based on his involvement in a related investigation. The opinion should remind practitioners that some rarely-invoked legal principles can have significant ramifications that might cause them to “jump back.”

The concept of accuser disqualification has been a bedrock principle of military justice for the last 180 years.⁸ In 1952, the Court of Military Appeals (COMA) defined disqualification as the “concept that the accuser should not appoint the court.”⁹ The COMA noted the accused’s right to have a case referred by an impartial convening authority “must be jealously guarded or abuses will creep in.”¹⁰ In even stronger language, the court declared that accuser disqualification “has been one of the pillars of military justice and that to weaken it would tend to destroy the system.”¹¹ The current rules for accuser disqualification are

⁷ FOOTLOOSE, *supra* note 1.

⁸ See *United States v. Gordon*, 2 C.M.R. 161, 163–66 (C.M.A. 1952) (providing an excellent history of accuser disqualification). The *Gordon* opinion traced accuser disqualification to a congressional act in 1830 and showed its development through various scholarly writings, Judge Advocate General directives, service court opinions, and even a ruling from the U.S. Attorney General. *Id.* The COMA concluded, “We have purposefully developed the origin and history of the rule to emphasize the fact that it has been one of the pillars of military justice and that to weaken it would tend to destroy the system.” *Id.* at 166–67. See also *United States v. Jeter*, 442 M.J. 442, 448 (C.M.A. 1992) (Gierke, J., concurring in the result) (tracing the history of the accuser disqualification from an amendment to Article of War 65 in 1830 through the statutory definition adopted in Article 1(11) of the UCMJ in 1950, which was renumbered Article 1(9) in 1956).

⁹ *Id.* at 163–64.

¹⁰ *Id.* at 164.

¹¹ *Id.* at 166–67. See also *United States v. Corcoran*, 17 M.J. 137, 138 (C.M.A. 1984) (“It has been a cardinal principle from the early Articles of War to the present that an accuser may not appoint the court that tries an

scattered throughout the *Manual for Courts-Martial*. Under Article 1(9), UCMJ, an accuser is one: (1) “who signs and swears to charges” (type one accuser); (2) “who directs that charges nominally be signed and sworn to by another” (type two accuser); or (3) “who has an interest other than an official interest in the prosecution of the accused” (type three accuser).¹² Articles 22(b) and 23(b) prohibit an accuser from convening general and special courts-martial, respectively.¹³ The President has repeated this prohibition in Rules for Courts-Martial 504(c)(1) and 601(c), which bar all types of accusers from referring a case to a special or general court-martial.¹⁴ “Type one” and “type two” accusers are also known as “statutory accusers,” as the disqualification is limited in scope and based on the preferral of charges; by contrast, “type three” accusers are “personally disqualified” because their disqualification is based on an other-than-official interest in the case.¹⁵ Because status as a “type one” accuser is easily determined (any convening authority who prefers charges), litigation in this field has focused on whether challenged convening authorities are “type two” or “type three” accusers.

In *United States v. Ashby*,¹⁶ the CAAF rejected claims that a convening authority was disqualified from referring a

accused.”) (citing *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952)).

¹² UCMJ art. 1(9) (2008). See generally *United States v. Ashby*, 68 M.J. 108, 129 (C.A.A.F. 2009) (separating three enumerated types of accusers under Article 1(9), UCMJ).

¹³ See UCMJ art. 22(b) (“If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.”); *id.* art. 23(b) (“If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.”).

¹⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(c)(1) (2008) [hereinafter MCM] (“An accuser may not convene a general or special court-martial for the trial of the person accused.”); *id.* R.C.M. 601(c) (“An accuser may not refer charges to a general or special court-martial.”). See also *id.* R.C.M. 303 discussion (“A person who is an accuser (see Article 1(9)) is disqualified from convening a general or special court-martial in that case.”) (citing RCM 504(c)(1)).

¹⁵ See *McKinney v. Jarvis*, 46 M.J. 870, 875 n.5 (A. Ct. Crim. App. 1997) (differentiating between “statutory disqualification” and “personal disqualification” of an accuser), *review denied*, 48 M.J. 15 (C.A.A.F. 1997). See also Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 22 (“A convening authority-accuser may be disqualified in either a ‘statutory’ sense (for example, having sworn to the charges) or in a ‘personal’ sense by virtue of having an ‘other than official’ interest in the case.”). A statutorily-disqualified accuser cannot refer a case to a special or general court-martial, but may offer non-judicial punishment, refer the case to a summary court-martial, appoint an Article 32 investigating officer, and forward the charges with recommendation to a higher convening authority noting the statutory disqualification. *McKinney*, 46 M.J. at 874–75. See also MCM, *supra* note 14, R.C.M. 401(c)(2)(A) (“If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.”). By contrast, a personally-disqualified (or “type three”) accuser cannot refer a case to a special or general court-martial, appoint an Article 32 investigating officer or make a recommendation to a higher convening authority for disposition.

¹⁶ 68 M.J. 108 (C.A.A.F. 2009).

court-martial as a “type two” or “type three” accuser. The accused was a Marine pilot who flew an EA-6B Prowler aircraft through a gondola cable in the Italian Alps, killing twenty passengers.¹⁷ The accused was court-martialed twice.¹⁸ In the first trial he was acquitted of all charges relating to the deaths.¹⁹ During the first case, the Government preferred additional charges for conduct unbecoming an officer. The accused objected to the additional charges being joined, so the military judge ordered them severed from the original charges and the Government tried the accused for these offenses at a second court-martial.²⁰ During the second trial, the defense alleged unlawful command influence (UCI), based in part on the intense media interest in the case.²¹ The UCI motion extended to a defense challenge of the convening authority as both a statutorily- and personally-disqualified accuser.²² Regarding the disqualification issue, then-Lieutenant General Pace (the eventual general court-martial convening authority), in his capacity as Commander, United States Marine Corps Forces Atlantic, and Commander, United States Marine Corps Forces Europe, convened a command investigation board (CIB) into the gondola incident and appointed his deputy commanding general to investigate.²³

The defense first argued the convening authority was a “type two” accuser because he “essentially” triggered preferral by influencing the CIB and identifying charges by virtue of endorsing the CIB report.²⁴ The defense further argued the convening authority was a “type three” accuser because of his personal involvement in the CIB and a general predisposition to the accused’s guilt.²⁵ The court first noted, “The test for determining whether a convening authority is an accuser is ‘whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.’”²⁶ In

¹⁷ *Id.* at 112.

¹⁸ *Id.* at 112–13.

¹⁹ *Id.* at 112. The charges included dereliction of duty, damaging military and nonmilitary property, involuntary manslaughter, and negligent homicide. *Id.*

²⁰ *Id.* at 112, 114.

²¹ *Id.* at 127.

²² *Id.* at 127–28.

²³ *Id.* at 125–26, 129.

²⁴ *Id.* at 129.

²⁵ *Id.*

²⁶ *Id.* at 130 (quoting *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) (internal quotations omitted)). The CAAF summarized the following standards for a “type three” accuser:

“Personal interests relate to matters affecting the convening authority’s ego, family, and personal property” and “[a] convening authority’s dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity.” *Id.* [*Voorhees*, 50 M.J. at 499]. We have found a personal interest where, for example, the

addressing the first argument, the CAAF found the convening authority did not act as a nominal accuser; specifically, he did not direct another to sign and swear the charges in the case.²⁷ The court rejected the defense claim that forwarding the CIB was tantamount to directing another to prefer charges.²⁸

In rejecting the second defense challenge, the CAAF noted that official action generally will not make the convening authority an “accuser.”²⁹ The CAAF found the convening authority’s interest was “wholly official,” as commanders have a responsibility to investigate accidents and Lieutenant General (Lt. Gen.) Pace’s frequent contact with the CIB did not show a “personal rather than a professional interest.”³⁰ Further, there was no evidence that the convening authority directed anyone (either expressly or impliedly) to prefer charges in this case.³¹

The opinion offers three practice points. First, the CAAF noted the presumption of regularity that applies to convening authority actions in military justice matters: “We presume that the legal officers properly performed their professional duties which included independent review of the evidence and preparation of only those charges for which they determined probable cause existed.”³² Second, a

convening authority will normally not be disqualified as an accuser for performing official duties, even when those duties overlap with the impartial review of court-martial charges; as the CAAF unmistakably held, “Interest in an incident and the investigation thereof is not personal—it is in fact the responsibility of a commander.”³³ Other cases have similarly held that convening authorities will not normally be disqualified by performing duties attendant to their command position, even when an accused is charged with disobeying the convening authority’s order.³⁴ Third, and perhaps most significant, defense counsel should be vigilant in raising this issue, particularly when a tenable unlawful command influence challenge is raised.³⁵ If a defense counsel fails to raise accuser disqualification, the issue is waived except for plain error.³⁶

III. Pleas and Providence Inquiries

During *Footloose*, the locals are nervous that Ren is stirring up trouble, trying to bring the evils of music and dancing into their town. One worried citizen says to the

Id.

³³ *Id.* at 131.

³⁴ See *United States v. Dominguez*, No. 200601385, 2009 WL 1863383 (N.M. Ct. Crim. App. June 30, 2009) (unpublished) (convening authority not disqualified for ordering accused to have no contact with accused’s wife, the victim of alleged battery). See also *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000) (convening authority not disqualified as an accuser when the accused was charged with disobeying the convening authority’s order “not to enter any Navy Exchange facility”).

³⁵ If the defense asserts the convening authority is personally disqualified as an accuser, there is likely a tenable claim of unlawful command influence. See *Ashby*, 68 M.J. at 128–29 (noting and rejecting defense argument that unlawful command influence affected the command investigation board of the accused conduct, which was also the subject of an accuser disqualification challenge).

³⁶ *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (“If an appellant fails to make a timely motion or objection raising the disqualification issue, the issue may be waived.”) (citing *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994); *United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992)). See Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003, at 22–23 (“Defense practitioners should take heed: failure to raise convening authority disqualification at trial may result in waiver.”) (discussing *Tittel*, 53 M.J. 313 and citing *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999)). But cf. *Tittel*, 53 M.J. at 315 (Effron and Sullivan, JJ., concurring in part) (arguing majority opinion rests solely on the conclusion that the convening authority was not an accuser, and the opinion does not mean the accuser issue can be “passively waived, as opposed to being the subject of a knowing and intelligent waiver”). See also *Jeter*, 35 M.J. at 447 (“We are inclined to believe that generally a violation of Article 22(b) is waived if an accused and his counsel are well aware thereof and make no objection or protest at trial.”); *United States v. Mack*, 56 M.J. 786, 794 (A. Ct. Crim. App. 2002) (“The appellant’s failure to raise the ‘accuser’ issue at trial waives appellate review of the issue, absent plain error.”). Last term, the CAAF made clear that convening authority disqualification is not a jurisdictional defect. *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (“[T]he disqualification of the convening authority . . . for being an accuser under Article 1(9), UCMJ, does not deprive the court-martial of jurisdiction”) (citing *United States v. Ridley*, 22 M.J. 43, 47–48 (C.M.A. 1986)).

convening authority is the victim in the case, *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); where the accused attempted to blackmail the convening authority, *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); and where the accused had potentially inappropriate personal contacts with the convening authority’s fiancée, *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

Id. See also *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001) (Baker, J., concurring) (“Personal interests relate to matters affecting the convening authority’s ego, family, and personal property. A convening authority’s dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity.”) (citing *Voorhees*, 50 M.J. at 498).

²⁷ *Ashby*, 68 M.J. at 130.

²⁸ *Id.* This argument was undercut because the charges at issue in the second court-martial were not investigated by the CIB or otherwise incorporated into the convening authority’s endorsement of the report. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 130–31.

³¹ *Id.* at 131.

³² *Id.* at 130. The CAAF provided the following to support the presumption of regularity:

See Article 34, UCMJ, 10 U.S.C. § 834 (2000) (imposing a duty on the staff judge advocate to prepare advice to the convening authority before a charge is referred to a general court-martial); *United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.A. 1951) (citing the presumption that a public officer charged with a particular duty has performed it properly); *United States v. Roland*, 31 M.J. 747, 750 (A.C.M.R. 1990) (“We will presume, in the absence of evidence to the contrary, that the staff judge advocate properly discharged his duties.”).

town's minister: "Eleanor and I are absolutely certain that this boy is organizing a dance. . . . We let some punk push us around it won't be long before every community standard is violated."³⁷ In similar fashion this term, military appellate courts have tried to strongly enforce certain standards while allowing other standards to wane. On the one hand, courts have enforced standards by upholding military judges' decisions to reject guilty pleas as irregular or improvident, expanding the scope of waiver when an accused enters a guilty plea, and providing a framework for military judges advising accuseds in guilty pleas for non-traditional offenses. On the other hand, courts have eroded standards by affirming guilty pleas that are based on limited factual inquiry or, worse, that include unresolved defenses presented during the guilty plea.

A. Irregular Pleas

The law for entering pleas seems well-established. The *Manual for Courts-Martial* recognizes five pleas: (1) guilty; (2) not guilty; (3) guilty to a lesser included offense; (4) guilty by exceptions; and (5) guilty by exceptions and substitutions.³⁸ Under RCM 910(b), if an accused makes an "irregular plea," the military judge must enter a plea of not guilty for the accused.³⁹ The discussion to the rule notes that an irregular plea includes a plea "such as guilty without criminality."⁴⁰ The law for irregular pleas can be less clear when an accused attempts to modify the language in a specification during the course of a guilty plea.

In *United States v. Diaz*,⁴¹ the accused served as a judge advocate at Guantanamo Bay, Cuba. While serving there, he concluded the Government was improperly withholding names of unrepresented detainees, so he downloaded classified "identifying information" in his office, printed a hardcopy of this information, cut it into smaller pieces, and sent it to the Center for Constitutional Rights in a Valentine's Day card.⁴² At trial, the accused attempted to plead guilty to conduct unbecoming under Article 133, UCMJ, by amending certain language in the specification.⁴³ The military judge rejected the plea as irregular under RCM

910(b), and the Navy-Marine Court of Criminal Appeals (NMCCA) affirmed in a unanimous unpublished opinion.⁴⁴

The *Diaz* court noted the discussion to RCM 910(b) defines an irregular plea to include "pleas such as guilty without criminality."⁴⁵ In reviewing a military judge's decision to reject a plea as "irregular," appellate courts apply an abuse of discretion standard.⁴⁶ The specification in *Diaz* originally read that the accused "did wrongfully and dishonorably transmit classified documents to an unauthorized individual."⁴⁷ The accused pled by excepting "classified documents" and substituting therefor "government information not for release."⁴⁸ The accused made a proffer of the facts that would be provided during the inquiry and argued the amended specification coupled with these facts would satisfy a plea for conduct unbecoming; the military judge ruled the amended specification did not state an offense and entered a plea of not guilty on the accused's behalf.⁴⁹ The NMCCA noted that disseminating "government information not for release" could amount to an offense punishable under Article 133 in the right circumstances.⁵⁰ However, the defense proffer and representations made by counsel indicated the accused would only admit to giving unclassified *names* of detainees (and no other identifying information).⁵¹ As a result, the Navy-Marine Corps court found the military judge did not abuse his discretion by rejecting the plea as irregular. On 2 September 2009, the CAAF granted review on three issues, including, "Whether the military judge abused his discretion in rejecting as irregular appellant's proffered guilty plea to a violation of Article 133."⁵²

There are three interesting issues in analyzing the form of pleas. First, military courts have recognized that an accused may enter a guilty plea, in part, to limit the information that would be admitted during a contested case.⁵³ Put another way, the defense may enter pleas to

³⁷ FOOTLOOSE, *supra* note 1.

³⁸ MCM, *supra* note 14, R.C.M. 910(a)(1) ("An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty.").

³⁹ *Id.* R.C.M. 910(b).

⁴⁰ *Id.* R.C.M. 910(b) discussion. The discussion further reads, "When a plea is ambiguous, the military judge should have it clarified before proceeding further." *Id.*

⁴¹ No. 200700970, 2009 WL 690614 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished), *review granted*, 68 M.J. 200 (C.A.A.F. 2009).

⁴² *Id.* at *1.

⁴³ *Id.* at *2.

⁴⁴ *Id.* at *2, *6.

⁴⁵ MCM, *supra* note 14, R.C.M. 910(b) discussion, *quoted in Diaz*, 2009 WL 690614, at *2.

⁴⁶ *Diaz*, 2009 WL 690614, at *2 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

⁴⁷ *Id.* at *5 n.4.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *7 (noting, for example, that an officer could violate Article 133 by providing a base phone directory to a terrorist group).

⁵¹ *Id.* at *8-9.

⁵² *United States v. Diaz*, 68 M.J. 200 (C.A.A.F. 2009).

⁵³ *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) ("[A]n accused might make a conscious choice to plead guilty in order to 'limit the nature of the information that would otherwise be disclosed in an adversarial contest.'" (quoting *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002)). *See also* 2 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 19-3 (3d ed. 2006) ("In determining the advisability of such action [the accused testifying during a

reduce the maximum sentence for an offense or to eliminate aggravating circumstances listed in the specification. For example, certain offenses include sentence escalators if the accused is charged and found guilty under aggravating circumstances.⁵⁴ The defense may also attempt to except out language to merely minimize the nature of the conduct, even if the maximum punishment is unaffected.⁵⁵ The second notable issue in this area is the broad discretion appellate courts afford a military judge in rejecting a guilty plea.⁵⁶ The third notable point is that a military judge may commit mere harmless error in accepting certain irregular pleas; if the defense pleads guilty to a charge without pleading guilty to the underlying specification, courts will generally find the error to be harmless.⁵⁷ Considering these three issues, appellate courts have properly proscribed broad latitude to military judges in deciding whether to reject a plea as irregular.⁵⁸

When the accused enters a plea, a military judge has great latitude to reject the form of a plea that appears to eliminate an element or modify the specification so that it fails to state an offense. Military judges would be wise to

merits trial], counsel must consider the possibility of impeachment of the accused with prior silence, illegally-obtained evidence, prior instances of bad acts, or prior convictions, among others.”).

⁵⁴ See generally UCMJ art. 112a (2008) (increasing the maximum confinement for marijuana possession from two years to five years if the accused possessed more than thirty grams); *id.* art. 121 (increasing the maximum confinement for larceny if the property stolen is “military property” or valued at more than \$500).

⁵⁵ See generally *United States v. Denier*, 47 M.J. 253, 254 n.1 (C.A.A.F. 1997) (noting accused pled guilty to conduct unbecoming an officer under Article 133 based on inappropriate relationship with an enlisted airman’s wife, by excepting “inviting her to have alcoholic drinks” and pleading to merely “talking to her about having alcoholic drinks”).

⁵⁶ *Inabinette*, 66 M.J. at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *But see* *United States v. Johnson*, 12 M.J. 673, 674 (A.C.M.R. 1981) (noting military judge may not act “arbitrarily” in rejecting a guilty plea and finding error when military judge refused to accept plea because accused refused to name his drug supplier).

⁵⁷ See MCM, *supra* note 14, R.C.M. 910(b) discussion (“An irregular plea includes . . . guilty to a charge but not guilty to all specifications thereunder.”); *United States v. Greene*, 64 M.J. 625, 629 (C.G. Ct. Crim. App. 2007) (finding no “possible prejudice” in guilty plea case when defense counsel pled guilty to charge with no plea to specification of that charge, and military judge entered findings of guilt to both the charge and specification; court “urge[d] military judges to insist on complete pleas in all cases”); *United States v. Williams*, 47 M.J. 593, 595 (N-M. Ct. Crim. App. 1997) (refusing to grant relief for erroneous plea to charge with no plea to underlying specification and holding, “We do not find any possible prejudice, and refuse to grant the appellant a windfall on the basis of a technical oversight by his trial defense counsel which the military judge failed to correct.”).

⁵⁸ The military judge in *Diaz* may have been upheld on appeal had he accepted the accused’s plea, assuming an adequate factual predicate was provided on the record. *United States v. Diaz*, No. 200700970, 2009 WL 690614, at *6 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished) (“We agree with the appellant that the wrongful release of ‘government information not for release’ could, under the right circumstances, constitute an act reflecting sufficient dishonor and lack of integrity to constitute an offense under Article 133, UCMJ.”).

follow the lead of their colleague in *Diaz* and reject pleas that appear to eliminate the criminality of a specification. Simply stated, military judges have a duty to reject purported guilty pleas that do not admit guilt. In close cases, military judges should reject such pleas as irregular. Appellate judges would be wise to continue to defer to military judges who reject these pleas, as this rule serves to safeguard the integrity of the guilty plea process.

B. Guilty Pleas and Waiver

*Almost paradise!
We’re knocking on Heaven’s door.
Almost paradise!
How could we ask for more?
I swear that I can see forever in your eyes.*⁵⁹

A guilty plea can seem like paradise to an appellate court reviewing a case. The accused’s unconditional guilty plea waives any objection or motion, regardless of whether or not it has been raised, “insofar as the objection relates to the factual issue of guilt.”⁶⁰ As one treatise explained, “[A] provident guilty plea waives all nonjurisdictional defects, whether raised at trial or not, that do not violate the accused’s right to due process.”⁶¹ The Supreme Court has long favored this approach in reviewing guilty pleas: “The point . . . is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case.”⁶² This path to paradise can be sidetracked when issues raised in a guilty plea are characterized as “jurisdictional” and are, therefore, non-waivable.

However, courts are generally reluctant to characterize issues as jurisdictional and have applied the waiver doctrine to some of the most fundamental protections afforded a

⁵⁹ FOOTLOOSE, *supra* note 1 (lyrics by Ann Wilson & Mike Reno).

⁶⁰ MCM, *supra* note 14, R.C.M. 910(j). This subparagraph exempts conditional pleas from the general rule of waiver. *Id.* The accused may enter into a conditional plea with the consent of the Government and the military judge to preserve an otherwise-waived issue. *Id.* R.C.M. 910(a)(2) (“With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion.”). *But see* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-26b (16 Nov. 2005) (“Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division . . . Office of The Judge Advocate General, HQDA, prior to the government’s consent regarding an accused entering a conditional guilty plea at court-martial.”). For a brief discussion of the procedural requirements for entering a conditional guilty plea, see *United States v. Bradley*, 68 M.J. 279, 281–82 (C.A.A.F. 2010).

⁶¹ 2 GILLIGAN & LEDERER, *supra* note 52, at 19-7.

⁶² *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975), *quoted in* *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (emphasis in original).

military accused.⁶³ In *United States v. Schweitzer*,⁶⁴ the accused moved to dismiss charges, arguing the convening authority was disqualified from referring the case as an “accuser” under Article 1(9), UCMJ.⁶⁵ The military judge denied the motion, and the accused later pled guilty pursuant to an approved pretrial agreement.⁶⁶ In a unanimous decision, the CAAF held the accused’s unconditional guilty plea waived the convening authority disqualification issue.⁶⁷ The *Schweitzer* court noted that Rule for Courts-Martial (RCM) 910(j) provides a “bright-line rule” that presumes waiver after an accused enters an unconditional guilty plea.⁶⁸ The CAAF added, “Objections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: An unconditional guilty plea generally ‘waives all defects which are neither jurisdictional nor a deprivation of due process of law.’”⁶⁹ Applying these principles, the CAAF held accuser disqualification under Article 1(9) does not deprive the court-martial of jurisdiction, so the issue was waived by the accused’s unconditional guilty plea.⁷⁰ As a practice point for military judges, the CAAF noted with approval that the military judge properly advised the accused that his plea of guilty waived the litigated accuser disqualification challenge, further bolstering the conclusion that the issue was waived by the guilty plea.⁷¹

⁶³ See *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”), *quoted in* *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (finding an accused can waive double jeopardy by pleading guilty).

⁶⁴ 68 M.J. 133 (C.A.A.F. 2009).

⁶⁵ As discussed in Part I of this article, an accuser is one: (1) “who signs and swears to charges”; (2) “who directs that charges nominally be signed and sworn to by another [type two accuser]”; or (3) “who has an interest other than an official interest in the prosecution of the accused [type three accuser].” UCMJ art. 1(9) (2008). See *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009), discussed *supra* notes 16-33 and accompanying text.

⁶⁶ *Schweitzer*, 68 M.J. at 136–37.

⁶⁷ *Id.* at 134.

⁶⁸ *Id.* at 136.

⁶⁹ *Id.* (quoting *United States v. Rehorn*, 26 C.M.R. 267, 268–69 (C.M.A. 1958)). The CAAF noted that so long as the convening authority is authorized to convene the court under Articles 22(a) and 23(a), disqualification under Article 1(9) does not deprive the court-martial of jurisdiction. *Id.* By entering an unconditional guilty plea, the accused waived this nonjurisdictional issue for appeal. *Id.*

⁷⁰ *Id.* The CAAF noted that so long as the convening authority is authorized to convene the court under Articles 22(a) and 23(a), disqualification is not a jurisdictional defect. By entering an unconditional guilty plea, the accused waived this issue for appeal.

⁷¹ *Id.* at 137. The military judge advised the accused regarding the issues waived by his guilty plea:

[B]y your pleas of guilty, you also give up your right to appeal the decisions, not only that I made, but the decisions that were made by [the military judge] during the joint motion session of this trial. By your plea of guilty, you waive all motions with the exception of motions regarding multiplicity; motions involving jurisdictional issues; and, as far as the

An unconditional guilty plea similarly waives most issues relating to multiplicity and unreasonable multiplication of charges. In *United States v. Rhine*,⁷² the accused pled guilty, among other things, to damaging non-government property and stalking a female airman. For the damaging property offense, the accused admitted to slashing the tires of two cars, carving “slut” on the hood of a car, and writing “Chad ‘heart’ U” on another car.⁷³ For the stalking offense, the accused admitted to the same conduct as the damaging property charge, and added that he sent repeated text messages to the victim.⁷⁴ The Air Force Court of Criminal Appeals (AFCCA) reasoned, “Ordinarily, an unconditional guilty plea waives a multiplicity issue, unless it rises to the level of plain error. The appellant bears the burden of showing that such an error occurred.”⁷⁵ Based on the accused’s providence inquiry, the AFCCA found it “clear” that the two offenses were factually distinguishable.⁷⁶ Stalking and damaging personal property require different elements of proof and the providence inquiry revealed “clear differences in the focus of the military judge,” who specifically focused on the “fear” element of stalking and then on the “specifics of the damage” for the other offense.⁷⁷ Hence, the offenses were not facially duplicative,⁷⁸ and the defense did not carry its burden.

The Air Force court noted that the parties at trial apparently did not believe the charges ran afoul of multiplicity principles.⁷⁹ The military judge mentioned the issue while summarizing an RCM 802 conference by saying “the court raised the issue of whether there was any

guilty plea is concerned, unlawful command influence, selective prosecution, or ineffectiveness of counsel. All other motions are waived.

Id. (alteration in original).

⁷² 67 M.J. 646 (A.F. Ct. Crim. App. 2009), *review denied*, 68 M.J. 184 (C.A.A.F. 2009).

⁷³ *Id.* at 647.

⁷⁴ *Id.* at 653.

⁷⁵ *Id.* at 652–53 (citing *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998)). See also *United States v. Purdy*, 67 M.J. 780, 781 (N-M. Ct. Crim. App. 2009) (holding receipt and possession of child pornography were separate offenses based on the accused’s providence inquiry and “[a] guilty plea waives a multiplicity issue absent plain error”) (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)).

⁷⁶ *Rhine*, 67 M.J. at 654 (“We find it clear that the appellant’s offenses of stalking and of damaging Amn KRS’ vehicles are factually distinguishable.”).

⁷⁷ *Id.* at 653–54.

⁷⁸ An unconditional guilty plea waives challenges for unreasonable multiplication of charge or multiplicity, except for charges that are “facially duplicative.” *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997); *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991).

⁷⁹ *Rhine*, 67 M.J. at 652–53.

multiplicity” regarding these two offenses.⁸⁰ The defense counsel did not object, and there is no other mention of the issue in the record.⁸¹ While not case dispositive, the AFCCA suggested that the failure to object showed the parties agreed the charges were not facially duplicative; this conclusion was bolstered by the military judge’s separate inquiry (and separate focus) when questioning the accused about the two offenses.⁸² The AFCCA correctly concluded that the defense waived these issues by pleading guilty and then reviewed for plain error before ultimately denying appellant’s challenge.⁸³

There is a simple message this term regarding pleas and the waiver doctrine: the already-strong doctrine continues to expand and will likely be dispositive in even more appellate cases. Courts examining guilty plea cases on appeal will still review alleged jurisdictional defects and due process violations, but those two avenues for review are becoming increasingly narrow. By way of example, the CAAF decided this term that accuser disqualification, a recognized pillar of the military justice system, is not a jurisdictional defect and, therefore, is waived by an unconditional plea. Simply stated, the growing list of issues waived by an unconditional plea, coupled with the limited legal issues that are considered jurisdictional or related to due process, may effectively preclude appellate review of guilty pleas except for matters relating to the providence inquiry.

C. Advising the Accused of the Offenses and Elements in a Guilty Plea

While Ren is planning his dance in *Footloose*, the town is also worried about books like *Slaughterhouse-Five* getting into the hands of children. Accordingly, concerned townfolk organize a book burning outside the library. The pastor thinks the town is overreacting, which leads to this terse exchange with a concerned parent:

Roger: Doesn’t take much time for corruption to take root.

Reverend Moore: How long is that, Roger? About as long as it takes compassion to die?⁸⁴

⁸⁰ *Id.* at 652 n.9. See generally MCM, *supra* note 14, R.C.M. 802(a) (“After referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.”).

⁸¹ *Rhine*, 67 M.J. at 652 n.9 (“With the exception of that reference to multiplicity, there is nothing else contained in the record of trial which indicates what was discussed and there is no ruling by the military judge on the record. The trial defense counsel did not raise the issue.”).

⁸² *Id.* at 653.

⁸³ *Id.* at 654. An accused can affirmatively waive challenges to “facially duplicative” charges as part of a pretrial agreement. See *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009) discussed *infra* notes 233–44 and accompanying text.

⁸⁴ FOOTLOOSE, *supra* note 1.

Military law recognizes that an incomplete providence inquiry can corrupt a guilty plea, so it places a great burden on military judges to explain the elements of an offense to an accused before a guilty plea may be accepted, in stark contrast to the lower standard in civilian courts.⁸⁵ Under RCM 910(c), “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 . . . [t]he nature of the offense to which the plea is offered”⁸⁶ The Discussion section further notes the military judge should explain the elements of the offenses to which the accused has pled guilty.⁸⁷ As the Supreme Court has explained, “[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”⁸⁸ On appeal, military courts do not require textbook recitations of the elements of an offense; rather, courts will examine the entire record to decide whether the accused understood the elements.⁸⁹ Military judges also have latitude in providing legal definitions to an accused when a specific term is not defined by the *Manual* or by statute. Unfortunately, this fluid standard has led to litigation about the accuracy of the military judge’s advice to the accused, particularly in cases with technical legal theories or nuanced elements.

In *United States v. Craig*,⁹⁰ the accused pled guilty to distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2), charged under clause 3 of Article 134, UCMJ. The military judge correctly advised the accused of the statutory elements of the offense as well as several applicable definitions provided under 18 U.S.C. § 2256.⁹¹

⁸⁵ See *United States v. Aleman*, 62 M.J. 281, 284 n.1 (C.A.A.F. 2006) (citing *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) for the federal standard that “constitutional prerequisites of a guilty plea are satisfied if counsel has explained the elements to the defendant” as opposed to the military standard in *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), which held, “under military law, counsel’s explanation will not relieve the military judge of the responsibility to explain the elements on the record”).

⁸⁶ MCM, *supra* note 14, R.C.M. 910(c).

⁸⁷ *Id.* R.C.M. 910(c)(1) discussion.

⁸⁸ *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

⁸⁹ *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003) (“Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially.”) (citations omitted). The military judge may also be required to advise the accused of theories of vicarious liability. See *United States v. Craney*, 1 M.J. 142, 143 (C.M.A. 1975) (noting that when an accused is pleading guilty as an aider and abettor, the military judge has a duty to inquire “into the accused’s understanding of the difference between a principal and his position as an aider and abettor and to determine that the actual extent of accused’s involvement made him responsible for the offenses charged”).

⁹⁰ 67 M.J. 742 (N-M. Ct. Crim. App. 2009), *aff’d*, 68 M.J. 399 (C.A.A.F. 2009).

⁹¹ *Id.* at 744. These included “definitions of child pornography, minor, sexually explicit conduct, and visual depiction, which, he said, includes data stored on a computer.” *Id.*

The term “distribute” is not defined under 18 U.S.C. §§ 2252A or 2256, so the military judge defined the term during the providence inquiry using the definition under Article 112a, UCMJ.⁹² On appeal before the Navy-Marine Court of Criminal Appeals (NMCCA), the defense argued the accused’s plea was improvident because the military judge did not provide an accurate explanation of “distribute.”⁹³

The *Craig* opinion provides an excellent summary of the law governing guilty pleas. In reviewing a guilty plea, a military appellate court must apply the “substantial basis” test, which states, “A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea.”⁹⁴ In applying this test, the court may consider all matters contained in the record, including the stipulation of fact, providence inquiry, and inferences that can be drawn from them.⁹⁵ The NMCCA noted that the accused must give a factual basis for the guilty plea, and whether this component was satisfied is a mixed question of law and fact.⁹⁶ Despite the legal component to this review, courts apply an abuse of discretion standard in considering the military judge’s decision to accept a guilty plea.⁹⁷ Of import to this case, an accused must understand the elements of the offense, which leads to the “military judge’s duty to accurately inform the [accused] of the nature of his offense, and then to elicit from him a factual basis to support his plea.”⁹⁸

Applying these rules, the *Craig* court determined the military judge properly advised the accused of the elements, including the legal term “distribute.”⁹⁹ Relying on *United States v. Kuemmerle*,¹⁰⁰ the NMCCA noted three sources to find the meaning of terms not defined in statute: “(1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance

gleaned from any parallel UCMJ provisions.”¹⁰¹ In *Kuemmerle*, the CAAF affirmed a military judge’s explanation of “distribute” as derived from *Black’s Law Dictionary* and *Webster’s Third New International Dictionary Unabridged*.¹⁰² In *Craig*, the military judge provided this definition from Article 112a: “‘Distribute’ means to deliver to the possession of another.”¹⁰³ The court determined this definition was consistent with federal courts’ explanation of “distribution” in child pornography cases, as well as the federal model jury instructions.¹⁰⁴ The court then upheld the military judge’s explanation of the elements during the providence inquiry, finding the instruction was “consistent with the model federal instruction, the common meaning as articulated by the CAAF, and the usage in Article III courts.”¹⁰⁵

In addition to its excellent summary of the law, there is a simple lesson for practitioners in *Craig*. The Government should only assimilate federal or state statutes when the *Manual for Courts-Martial* does not address the accused’s misconduct and the assimilated offenses are the gravamen of the case. *Craig* illustrates the challenges inherent in such a guilty plea, particularly in advising the accused of elements and applicable definitions that are not part of military case law or authority. When an accused pleads guilty to an assimilated offense, the military judge and counsel may have to find applicable explanations from federal and state statutes, federal sentencing guidelines, model jury instructions, and even dictionaries.¹⁰⁶ As the amount of legal research increases to craft a proper guilty plea advisement, the risk for error expands exponentially. Because of these additional hazards, trial counsel should only assimilate law when the underlying misconduct would independently warrant a court-martial.

⁹² *Id.* See MCM, *supra* note 14, ¶ 37c(3) (under Article 112a, “‘Distribute’ means to deliver to the possession of another.”).

⁹³ *Craig*, 67 M.J. at 743–44. The court ultimately reversed because the accused did not actually distribute child pornography. *Id.* at 746.

⁹⁴ *Id.* at 744 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

⁹⁵ *Id.* (citing *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)).

⁹⁶ *Id.* (citing UCMJ art. 45 (2008); MCM, *supra* note 14, R.C.M. 910(e); *United States v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006); *United States v. Holmes*, 65 M.J. 684, 687 (N-M. Ct. Crim. App. 2007)).

⁹⁷ *Id.* (citing *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)).

⁹⁸ *Id.* (citing *United States v. Care*, 40 C.M.R. 241 (C.M.A. 1969)). See also *United States v. Caudill*, 65 M.J. 756, 758 (N-M. Ct. Crim. App. 2007) (“Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists.”) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)), *review denied*, 66 M.J. 189 (C.A.A.F. 2008).

⁹⁹ *Craig*, 67 M.J. at 745.

¹⁰⁰ 67 M.J. 141 (C.A.A.F. 2009).

¹⁰¹ *Craig*, 67 M.J. at 744 (citing *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009)). Though not mentioned in *Craig*, the *Kuemmerle* court also considered the definition of “distribute” under Article 112a, UCMJ. See *Kuemmerle*, 67 M.J. at 144 (citing *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, ¶ 37c(3) (2000)).

¹⁰² *Craig*, 67 M.J. at 744.

¹⁰³ *Id.* (citing to the record of trial).

¹⁰⁴ In a footnote, the NMCCA noted the federal sentencing guidelines provide a broader definition of distribute that could encompass actual, constructive or attempted delivery: “‘Distribution’ means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor.” *Id.* at 745 n.1 (quoting U.S. SENTENCING GUIDELINES MANUAL 2G2.2, at cmt. n.1 (2008)). However, the court rejected this broader definition, reasoning that neither Congress nor the federal judiciary have applied the term so expansively.

¹⁰⁵ *Craig*, 67 M.J. at 745. The case was ultimately reversed because the accused merely made child pornography available for download on an Internet file sharing site; there was no evidence that anyone “actually *did* so such that the charged distribution resulted in a completed transfer of possession of the contraband.” *Id.* at 746 (emphasis in original).

¹⁰⁶ See *supra* notes 90-105 and accompanying text.

D. Factual Predicate in Providence Inquiry

In *Footloose*, Ren talks to another high school student about music, and there seems to be a huge gap in their knowledge of popular culture:

Ren: Don't you ever listen to the radio?

Willard: No. We got one radio at home, but it's never on.

Ren: You like Men at Work?

Willard: Which men?

Ren: Men at Work.

Willard: Where do they work?

Ren: They're a music group.

Willard: What do they call themselves?

Ren: Oh, no. What about the Police?

Willard: What about 'em?

Ren: Have you heard them?

Willard: No, but I seen 'em.

Ren: In concert?

Willard: No, behind you.¹⁰⁷

A providence inquiry can have the same awkward back-and-forth between the military judge and the accused, particularly when the military judge asks the accused to explain his criminal conduct. Under RCM 910(e), "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."¹⁰⁸

In the last term, the CAAF indicated that the factual basis is not always a high hurdle to clear. In *United States v. Nance*,¹⁰⁹ the accused pled guilty, among other things, to wrongful use of Coricidin HBP Cough and Cold Medicine (CCC) on divers occasions, as conduct prejudicial to good order and discipline under Article 134.¹¹⁰ On appeal, the defense argued the providence inquiry did not provide a sufficient factual basis to show the accused's conduct was prejudicial to good order and discipline.¹¹¹ In a unanimous decision written by Judge Ryan, the CAAF upheld the accused's guilty plea. In examining a providence inquiry, courts look to the totality of the circumstances.¹¹² In this case, the relevant circumstances included the "stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry."¹¹³ The CAAF recognized that while leading questions are generally

disfavored, they may be used by a military judge to clarify points in a providence inquiry: "Although this Court has stressed that the use of leading questions that do no more than elicit 'yes' and 'no' responses during the providence inquiry is disfavored, it has never been the law that a military judge's use of leading questions automatically results in an improvident plea."¹¹⁴

Accordingly, the CAAF ruled it was permissible to use leading questions to "amplify" the inquiry.¹¹⁵ The CAAF noted with approval that the military judge only used leading questions to expound on three points that were already on the record: (1) "objective facts" from the stipulation of fact; (2) "objective facts" already elicited from the accused earlier in the plea inquiry; and (3) the accused's "explicit agreement" that his conduct was prejudicial to good order and discipline.¹¹⁶ The court also noted that whether factual circumstances amount to "conduct prejudicial to good order and discipline" is a "legal conclusion that remains within the discretion of the military judge in guilty plea cases."¹¹⁷

Focusing on the totality of the circumstances, the CAAF held the factual circumstances provided by the accused supported the plea.¹¹⁸ In his stipulation of fact, the accused admitted that each time he took CCC, "he consumed more than the maximum recommended daily dosage and did so with the intent to alter his mood or function"¹¹⁹ and that he would become unconscious or enter a disoriented state.¹²⁰ The stipulation noted the accused wrongfully used CCC in this manner five times with other junior enlisted airmen, including one who was junior in rank to the accused.¹²¹ The CAAF noted that an accepted stipulation of fact "is binding on the court-martial and may not be contradicted by the parties thereto."¹²² Despite the stipulation's detail in explaining the effects of cough and cold medicine, the stipulation only offered a conclusory statement about the element disputed on appeal.¹²³ During the providence inquiry, the accused did not explain how his conduct was

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002)).

¹¹⁸ *Id.* at 365.

¹¹⁹ *Id.* at 363.

¹²⁰ *Id.* The stipulation read: "On one or more occasions, [Appellant] passed out or went into a dream-like state, from which he emerged disoriented. The after-effects of CCC use experienced by [Appellant] were headache, dry throat, inflammation of the thyroids, and sometimes nausea." *Id.* at 363-64.

¹²¹ *Id.* at 363.

¹²² *Id.* at 366 (quoting *MCM*, *supra* note 14, R.C.M. 811(e)).

¹²³ *Id.* at 364 (noting the stipulation merely stated, "[Appellant's] use of CCC was, under the circumstances, to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.>").

¹⁰⁷ *FOOTLOOSE*, *supra* note 1.

¹⁰⁸ *MCM*, *supra* note 14, R.C.M. 910(e).

¹⁰⁹ 67 M.J. 362 (C.A.A.F. 2009).

¹¹⁰ *Id.* at 363. The accused was also pled guilty to wrongful use of ecstasy on divers occasions. *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 366 (citing *United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995)).

¹¹³ *Id.*

prejudicial to good order and discipline; rather, in response to a question about this element, the accused explained that he believed his conduct was service discrediting:

Well, Your Honor, as a member of the United States Air Force, it's not in the best interests and it puts a bad image on the United States Air Force when airman [sic] or other members sit around and, you know, break the law by doing, you know, partaking of [CCC] or any other type of drugs that are illegal; that brings a bad image upon yourself and, you know, who we work for.¹²⁴

The military judge asked nine follow-up questions of the accused, which all elicited cursory responses.¹²⁵ The military judge then recessed and spoke to counsel at an RCM 802 conference to determine if this element had been satisfied.¹²⁶ After the conference, the military judge said on the record that he agreed the accused's conduct would have a direct effect on good order and discipline.¹²⁷ However, the accused had not made such a statement during the providence inquiry.¹²⁸

It is possible the CAAF was setting up a "straw man,"¹²⁹ characterizing the defense arguments in an easily refutable way to discourage future challenges in this area. The military judge did not gloss over this element or disregard potential inconsistencies from the accused. To the contrary, the military judge received a stipulation of fact that stated the accused met with four fellow airmen (including one of lower rank) and intentionally used CCC to become intoxicated.¹³⁰ During the providence inquiry, the accused said, "I knew it was inappropriate for me to over medicate like that and *I knew it was against good order and discipline.*"¹³¹ Against this backdrop, the CAAF came to the sound conclusion that there was no substantial basis in fact or law for setting aside the plea. The accused admitted

during his providence inquiry and through his stipulation of fact that he used more than the recommended amount of cough syrup with other servicemembers so he could become intoxicated. Based on these undisputed facts, it was not necessary for the accused to explain the legal conclusion that this conduct was prejudicial to good order and discipline.

Nance is significant for three reasons. First, the CAAF held that an accused is not required to make legal conclusions about misconduct.¹³² Rather, it is sufficient that the accused provide facts that support such a conclusion, through the providence inquiry and stipulation of fact. Second, the court emphasized the importance of a stipulation of fact for gauging the providence of an accused's plea.¹³³ Because a stipulation may be used to uphold a guilty plea, it must do more than recite unsupported legal conclusions.¹³⁴ Finally, *Nance* is significant because it suggests a change in the court. The opinion curiously reads, "In this case, Appellant argues that the military judge failed to illicit, *from Appellant*, a sufficient factual basis to establish that Appellant's conduct was to the prejudice of good order and discipline in the armed forces."¹³⁵ This comment seems odd, as appellate defense counsel frequently make this argument in challenging the providence of the accused's plea.¹³⁶ The

¹²⁴ *Id.* (alterations in original).

¹²⁵ *Id.* (noting the accused replied either "Yes, Your Honor" or "Not entirely, Your Honor" to all nine questions).

¹²⁶ *Id.*

¹²⁷ *Id.* The military judge said: "He did talk about the fact that there were other members present when he was using and how the affects [sic], you know, of airmen getting together and abusing this would have a direct and palpable effect on good order and discipline, and certainly readiness as well." *Id.*

¹²⁸ *Id.* at 365.

¹²⁹ See JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 84 (2008) (noting appellate courts may "set up a straw man" to turn a seemingly-contentious issue into a clear-cut one) (quoting RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 305 (1988)).

¹³⁰ *Nance*, 67 M.J. at 365.

¹³¹ *Id.* (emphasis added).

¹³² *Cf.* United States v. Outhier, 45 M.J. 326, 331 ("Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea.") (citing United States v. Terry, 45 C.M.R. 216 (C.M.A. 1972)).

¹³³ See United States v. Harding, 61 M.J. 526, 528 (A. Ct. Crim. App. 2005) ("The boundary of those facts which may be considered in establishing the providence of a guilty plea has been expanded to include those facts agreed to by the accused in a stipulation of fact which is admitted at trial.") (citing United States v. Sweet, 42 M.J. 183, 185-86 (C.A.A.F. 1995)). See also Major Alexander N. Pickands, *Writing with Conviction: Drafting Effective Stipulations of Fact*, ARMY LAW., Oct. 2009, at 1-13 (discussing the law governing stipulations of fact and recommending a nine-step process for drafting comprehensive stipulations of fact).

¹³⁴ *Nance*, 67 M.J. at 365. See United States v. Zapp, No. 200700844, 2008 WL 4756023 (N-M. Ct. Crim. App. Oct. 30, 2008) (unpublished). The accused pled guilty to making provoking speech towards security personnel, charged as: "Bring it on, F* * * all you all bitches . . . I'm from the hood and I'm white. I will knock that mother f* * * * out." *Id.* at *6. On appeal, defense argued the military judge failed to elicit sufficient facts to show the words were "provoking or reproachful." *Id.* The NMCCA agreed, noting that provoking speech inquiries are necessarily "fact intensive," and the context surrounding the making of the statement is critical. *Id.* at *8. In this case, the accused could not remember the specific exchange, and relied on his defense counsel's advice after he interviewed two witnesses. *Id.* at *9. The court found the accused's "blanket and non-specific admission" was insufficient. *Id.* As a practice point, the NMCCA reviewed the stipulation of fact in an effort to find a factual predicate for the plea. Unfortunately, "this stipulation did no more than rearticulate the words used by the appellant and otherwise reflect, without supporting facts, the legal conclusions that the words were 'provoking and reproachful . . . [and] wrongful' and were intended to 'provoke and/or reproach a breach of peace between himself and security personnel'" *Id.* at *9-10 (quoting the stipulation of fact). The case may have had a different result if the stipulation of fact had been fully developed.

¹³⁵ *Nance*, 67 M.J. at 365 (emphasis supplied by the court).

¹³⁶ See generally Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 60 (noting in the 2004 judicial term appellate courts had "reversed numerous findings because a

opinion arguably suggests defense counsel have a duty to resolve disputes in this area; the CAAF noted with approval that the military judge conducted an RCM 802 session with counsel—outside the presence of the accused—during the providence inquiry to clarify the “prejudicial to good order and discipline” element and that the military judge asked defense counsel two separate times whether further inquiry was necessary.¹³⁷ While *Nance* illustrates the CAAF’s deference to a trial court accepting a guilty plea, another recent case suggests the same deference applies to a military judge’s decision to reject a plea as improvident.

In *United States v. England*,¹³⁸ one of the Abu Ghraib detainee abuse cases, the accused pled guilty to several offenses and successfully completed her providence inquiry.¹³⁹ During sentencing, the defense called a co-accused, Private Charles Graner, who testified that he had placed a “tether” (which resembles a leash) around a detainee’s shoulder to extract him from a cell at the Abu Ghraib prison.¹⁴⁰ Private Graner said he gave the “tether” to the accused and took her picture.¹⁴¹ This explanation was significant because the accused had pled guilty to conspiracy to maltreat a subordinate based on this incident with the leashed detainee and Private Graner implied his actions were lawful.¹⁴² Because of Private Graner’s somewhat ambiguous responses to defense counsel’s questions,¹⁴³ the military

review of the entire record failed to establish a factual predicate for the accused’s plea or left unresolved an inconsistent matter or defense raised during the court-martial” (citations omitted).

¹³⁷ *Nance*, 67 M.J. at 364. See *United States v. Carmer*, No. 20070173, 2008 CCA LEXIS 592 (A. Ct. Crim. App. Sept. 12, 2008) (per curiam) (unpublished). The accused pled guilty, *inter alia*, to communicating a threat. On appeal, the court ruled that the military judge “failed to elicit sufficient facts from [the accused] pertaining to whether the alleged unlawful communication of a threat was prejudicial to good order and discipline or service discrediting.” The court did not print the actual inquiry, but found the military judge failed to ask the accused whether the conduct met this element; this omission was not remedied by the stipulation of fact, which only parroted the language of the element without explaining how the accused’s conduct satisfied it. Curiously, to support its conclusion, the court quoted the following language from a dissenting opinion: “The mere recitation of the elements of a crime . . . and an accused’s rote response is simply not sufficient to meet the requirements of Article 45 [and *Care*].” (quoting *United States v. Barton*, 60 M.J. 62, 67 (C.A.A.F. 2004) (Erdmann, J., dissenting) (omission and alteration in original)). The court set aside the finding of guilty for that offense, affirmed the remaining offenses, and reassessed the sentence.

¹³⁸ No. 20051170, 2009 CCA LEXIS 349 (A. Ct. Crim. App. Sept. 10, 2009) (unpublished). The author served as trial counsel in this court-martial.

¹³⁹ *Id.* at *3–4.

¹⁴⁰ *Id.* at *5.

¹⁴¹ *Id.*

¹⁴² *Id.* at *7.

¹⁴³ The civilian defense counsel had this exchange with PVT Graner:

CDC: When you handed the tether to Private England, did you tell her why you were handing it to her?

WIT: No, sir, I just asked her to hold it.

judge asked the witness if this “cell extraction” was a legitimate use of force.¹⁴⁴ Private Graner responded, “Yes, sir, it was to me the safest way to get this prisoner out of his cell.”¹⁴⁵ The military judge rejected the accused’s plea to that offense, reasoning the charged co-conspirator testified there was no intent to maltreat.¹⁴⁶ The military judge further determined there was no longer a valid stipulation of fact and that the accused was not in compliance with her pretrial agreement.¹⁴⁷ Once the military judge made this ruling, the accused pled not guilty at a second court-martial and received a greater sentence than the one that would have been provided by the pretrial agreement.¹⁴⁸ On appeal, the defense argued the accused was provident and the military judge did not have the authority to reject the plea.¹⁴⁹

The Army Court of Criminal Appeals (ACCA) affirmed in an unpublished opinion, reasoning that the military judge did not abuse his discretion in rejecting the guilty plea.¹⁵⁰ The court noted a military judge’s decision to accept or reject a guilty plea is reviewed for an abuse of discretion, while questions of law arising from guilty are reviewed *de novo*.¹⁵¹ If an accused “sets up a matter inconsistent with the plea, the military judge must either resolve the inconsistency or reject the plea.”¹⁵² In this case, appellate defense counsel argued Private Graner’s personal belief about the incident was not relevant to the accused’s belief that she had conspired with him to commit maltreatment.¹⁵³ The ACCA rejected this argument, noting the testimony created a “direct contradiction” to the providence inquiry.¹⁵⁴ During the providence inquiry, the accused testified this incident was

CDC: Were you asking her as the NCO [noncommissioned officer] in charge of that tier, or were you asking her as a friend or as a fellow soldier?

WIT: I was asking her as *the senior person of that extraction team*, I guess you would say, as the NCO.

Id. at *5 (emphasis added).

¹⁴⁴ *Id.* at *7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *7–8.

¹⁴⁸ *Id.* at *3 (pretrial agreement capped confinement at thirty months); *Id.* at *1 (adjudged sentence at contested court-martial included confinement for thirty-six months).

¹⁴⁹ *Id.* at *9.

¹⁵⁰ *Id.* at *11.

¹⁵¹ *Id.* at *8 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)).

¹⁵² *Id.* at *10 (citing UCMJ art. 45(a) (2008)).

¹⁵³ *Id.* at *9. The court summarized the defense arguments: “PVT Graner’s ‘understanding, belief, or interpretation’ of the incident was irrelevant to appellant’s belief that she conspired with PVT Graner to commit maltreatment. Appellant further asserts that PVT Graner’s testimony was simply his attempt to rationalize his behavior.” *Id.*

¹⁵⁴ *Id.* at *10.

“degrading and humiliating” for the detainee and that Private Graner took photographs “for his personal use and amusement.”¹⁵⁵ By contrast, Private Graner described a lawful use of force that he legitimately documented by taking photographs, which he said he was required to do pursuant to standing rules of engagement.¹⁵⁶ Once there was conflicting testimony about the intent of the alleged conspirators, the military judge was within his discretion to reject the plea.¹⁵⁷

England illustrates the need to maintain the abuse of discretion standard for accepting guilty pleas. If the military judge had re-opened the providence inquiry and ultimately accepted the guilty plea, appellate defense counsel would have undoubtedly argued the military judge abused his discretion in allowing the plea to go forward. Put another way, military judges should receive great deference in deciding whether the accused’s guilty plea is supported by the record, even if that deference limits appellate relief.¹⁵⁸ Without such deference, the judgments made at the trial level to accept or reject a plea would routinely lead to reversal. Put another way, reasonable military judges may arrive at different conclusions after observing an accused’s providence inquiry. Courts should only reverse these decisions when a reasonable factfinder could not have arrived at the conclusion made by the military judge.

E. Defenses Raised During Guilty Pleas

During *Footloose*, the town’s pastor feels his daughter is slipping away from him. She sneaks out of town to listen to music, drinks with her friends, and has even started seeing Ren. One night, he confronts his daughter, Ariel, about where she has been:

Reverend Moore: I don’t understand why you feel it necessary to lie to me.

Ariel: I don’t know why you find it necessary to check up on me.

Reverend Moore: I’m concerned about your well-being, that’s all.¹⁵⁹

Military judges walk a similar fine line during guilty pleas, working to ensure an accused is actually guilty of the charged offenses before accepting a plea while also considering whether potential defenses affect the providence of the plea. On the one hand, Article 45(a) mandates, “If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea . . . a plea of not guilty *shall* be entered.”¹⁶⁰ The Discussion to RCM 910(e) similarly directs, “If any potential defense is raised by the accused’s account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense.”¹⁶¹ This obligation to resolve possible defenses continues throughout the trial, even after findings are announced.¹⁶²

On the other hand, military courts have properly acknowledged that an accused may elect to rein in the evidence presented at a guilty plea for strategic reasons: “We are similarly mindful that a decision to plead guilty may include a conscious choice by an accused to limit the nature of the information that would otherwise be disclosed in an adversarial contest. Thus, this Court has declined to adopt too literal an application of Article 45 and R.C.M. 910(e).”¹⁶³ Recognizing this potential tension, appellate courts have attempted to differentiate between defenses actually raised during a guilty plea and the “mere possibility” of a defense.

The courts have created a fine line between a “mere possibility” of a defense (which does not require the military judge instruct the accused of the defense) and a possible defense (which triggers an obligation for the military judge to instruct the accused to ensure the plea is provident). The blurry line that separates these two legal conclusions was further obfuscated in *United States v. Riddle*.¹⁶⁴ There, the accused pled guilty to wrongful use of marijuana and a

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *10–11. The ACCA provided this summary of Private Graner’s testimony: “He testified that his purpose in taking the photograph was to document a valid, lawful ‘planned use of force.’ He testified further that he was required under the 800th Military Police Rules of Engagement to document this ‘planned use of force’ and he did so by taking the photograph.” *Id.*

¹⁵⁷ *Id.* at *11. Though not mentioned in the opinion, the *Manual* contemplates that a matter inconsistent with the accused’s plea may be raised by someone other than the accused. See MCM, *supra* note 14, R.C.M. 910(e) discussion (“If any potential defense is raised by the accused’s account of the offense *or by other matter presented* to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the offense.”) (emphasis added).

¹⁵⁸ See Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: Trial Defense Attorney’s Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 16 (“Because of the degree of deference appellate courts traditionally grant to trial judges’ rulings through their standards of review, it is almost always difficult to obtain any relief on appeal, even with a properly preserved issue.”).

¹⁵⁹ FOOTLOOSE, *supra* note 1.

¹⁶⁰ UCMJ art. 45(a) (2008) (emphasis added).

¹⁶¹ MCM, *supra* note 14, R.C.M. 910(e) discussion.

¹⁶² *Id.* R.C.M. 910(h)(2) (“If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea.”).

¹⁶³ *United States v. Jordan*, 57 M.J. 236, 238–39 (C.A.A.F. 2002), *quoted in United States v. Hollmann*, NMCCA 200900226, 2009 WL 2599350 (N-M. Ct. Crim. App. Aug. 25, 2009) (unpublished).

¹⁶⁴ 67 M.J. 335 (C.A.A.F. 2009).

forty-seven-day AWOL.¹⁶⁵ During the guilty plea, there was substantial evidence that the accused had serious mental health problems.¹⁶⁶ Notably, the stipulation of fact read the accused suffered from chronic alcohol and marijuana dependence, bipolar disorder, and borderline personality disorder (all conditions that predated her enlistment).¹⁶⁷ The accused was also pending an administrative discharge for her mental health condition before going AWOL.¹⁶⁸ Perhaps most telling, the accused was committed to a mental health facility *at the time of trial* and was scheduled to return there when the trial was complete.¹⁶⁹ During the providence inquiry, the accused stated she was being treated for “[b]ipolar and borderline personality disorder with severe depression.”¹⁷⁰ She said she was taking “Zoloft, 100 milligrams, with Topamax three times a day; Ibuprofen, 800 milligrams three times a day; Zyrtec; Atarox [sic], Serequel; and—.”¹⁷¹ The military judge interrupted to ask the accused what those medications were treating, and she responded, “Sleep aids, mood suppressants, and a couple of anti-depressants.”¹⁷² Of import to the CAAF, a psychiatrist prepared a report before charges were preferred concluding the accused had the “mental capacity” to understand and participate in the proceedings, and that she was “mentally responsible,” though the report was not part of a sanity board.¹⁷³ The military judge asked a series of questions about the accused’s mental health problems, which primarily elicited “yes” or “no” responses.¹⁷⁴ The military judge did

not instruct the accused about mental responsibility as a defense, despite the substantial evidence that such a defense might apply. In a surprising split opinion, the CAAF affirmed.

In a 3-2 decision authored by Judge Stucky, the CAAF found there was not a substantial basis in law or fact that would warrant setting aside the guilty plea.¹⁷⁵ Citing oft-quoted language from *United States v. Shaw*,¹⁷⁶ the majority noted the “mere possibility” of a defense or inconsistency is not sufficient for setting aside an otherwise provident plea.¹⁷⁷ Unlike other potential defenses, mental responsibility is an affirmative defense that requires “clear and convincing evidence.”¹⁷⁸ Because of the heightened quantum of proof required for such a defense, “[a] military judge can presume, in the absence of contrary circumstances, that the accused is sane and, furthermore, that counsel is competent.”¹⁷⁹

The CAAF discussed a series of recent cases addressing mental responsibility issues raised during a providence inquiry. In *United States v. Shaw*,¹⁸⁰ the accused testified during his unsworn statement that he had a history of bipolar disorder; the CAAF held in that case that the mention of bipolar disorder only raised the “mere possibility” of a defense and not a substantial basis in law or fact to question the plea.¹⁸¹ Curiously, the majority then considered *United States v. Harris*¹⁸² in which an accused was diagnosed with a mental disease or defect *after* trial, so the military judge was

¹⁶⁵ *Id.* at 336 (noting the accused left her unit on 1 March 2007 and voluntarily returned on 16 April 2007).

¹⁶⁶ *Id.* at 336–37.

¹⁶⁷ *Id.* at 336. These facts were part of the stipulation of fact and were “binding on the court-martial.” See MCM, *supra* note 14, R.C.M. 811(e) (“[A] stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto.”).

¹⁶⁸ *Riddle*, 67 M.J. at 336.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 337 (internal quotations omitted).

¹⁷² *Id.*

¹⁷³ *Id.* According to the CAAF, the record was unclear about why this report was generated. The form was completed nine days before charges were preferred and discusses the company commander’s decision to pursue “the most rapid separation possible.” *Id.*

¹⁷⁴ The CAAF summarized this exchange during the providence inquiry regarding the accused’s mental illness:

MJ: Okay. I understand that at the conclusion of this trial today you are going to return to the Bradley Center for continued treatment?

ACC: Yes, sir.

MJ: All right. . . . The question is whether or not you are—you believe that you are competent to stand trial. Do you think you are?

ACC: Yes, sir.

MJ: Do you believe that you fully understand not only the ramifications of this court-martial but what is going to happen today?

ACC: Yes, sir.

Id. at 336–37 (quoting from the record of trial).

¹⁷⁵ *Id.* at 338. An appellate court will only set aside a guilty plea if something in the record raises a substantial bias in law or fact to question the providence of the plea. *Id.* (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

¹⁷⁶ 64 M.J. 460, 462 (C.A.A.F. 2007).

¹⁷⁷ *Riddle*, 67 M.J. at 338 (citing *Shaw*, 64 M.J. at 462).

¹⁷⁸ *Id.* (citing UCMJ art. 50a(a) (2008); MCM, *supra* note 14, R.C.M. 916(b)(2)).

¹⁷⁹ *Id.* (citing *Shaw*, 64 M.J. at 463).

¹⁸⁰ 64 M.J. 460 (C.A.A.F. 2007).

¹⁸¹ In *Shaw*, the accused pled guilty to several offenses, including wrongful use of cocaine, adultery, breaking restriction, and disobeying a no-contact order. In his unsworn statement, the accused said that he was severely beaten at some time before he committed the offense and suffered numerous injuries, including “two skull fractures, bruising and bleeding of the brain.” *Id.* at 461. He was diagnosed with “bi-polar syndrome because of the incident.” *Id.* On appeal, the defense argued that the military judge should have re-opened the providence inquiry to explore the alleged mental disorder. The CAAF rejected this argument because the “reference to his diagnosis of bipolar disorder, without more, at most raised only the mere possibility of a conflict with the plea.” *Id.* at 464.

¹⁸² 61 M.J. 391 (C.A.A.F. 2005).

unable to conduct the necessary providence inquiry. The CAAF concluded this case was similar to *Shaw*, as “the record does not reflect that her bipolar disorder affected the providence of her plea.”¹⁸³ The CAAF favorably noted in the opinion that the accused’s “counsel agreed that she [the accused] was competent and responsible at that time.”¹⁸⁴ Despite the court’s reliance on the defense counsel’s opinion, other courts have reasoned such lay evaluations should be given little weight.¹⁸⁵

The *Riddle* majority opinion reads like an appellate brief, making razor thin distinctions that ultimately amount to no difference. For example, the majority concluded, “There was no evidence of record that Appellant lacked mental responsibility at the time the offenses were committed.”¹⁸⁶ However, it was undisputed the accused ended her unlawful absence when she voluntarily surrendered to the mental health section at the installation’s hospital.¹⁸⁷ Put another way, the majority determined there was “no evidence” the accused lacked mental responsibility when she committed the offenses, even though she was admitted to an in-patient mental health facility on the last day of a charged AWOL. The majority similarly discounted the long list of prescription medications taken by the accused to treat verified mental health conditions. Again, the only issue before the court was whether there was enough evidence of a mental responsibility defense to require the military judge advise the accused of the defense. The majority’s conclusion that there was not sufficient evidence is not reasonable based on the facts presented during the plea.

The dissenting opinion, authored by Chief Judge Effron and joined by Judge Erdmann,¹⁸⁸ provides an excellent and legally astute summary of the errors in the majority opinion. The dissent begins by summarizing the requirements of a *Care* inquiry, focusing on the military judge’s duty to personally advise the accused of the elements of each offense and inquire into the accused’s conduct to ensure the servicemember is in fact guilty.¹⁸⁹ Once a “possible” defense is raised, the military judge must inquire further

with the accused to determine if the defense applies.¹⁹⁰ If the accused’s explanation demonstrates that the defense does not apply, the military judge is not required to explain the defense to the accused and may accept the plea.¹⁹¹ “If, however, the military judge’s inquiries do not bring forth evidence demonstrating that the defense is inapplicable, the military judge must explain the defense to the accused.”¹⁹² The dissent noted that this inquiry hinges on the military judge’s discussion with the accused, independent of counsel: “The providence inquiry centers on the special relationship between the accused and the military judge, not between the accused and counsel.”¹⁹³

The dissent correctly summarized the substantial evidence of a mental responsibility defense: (1) the accused was diagnosed with bipolar disorder and borderline personality disorder; (2) the accused was “confined” in an inpatient mental health facility for the three weeks before her court-martial; (3) the accused was “taking at least six types of medication, including mood suppressants and anti-depressants”; (4) a mental health report showed the accused had attempted suicide twice; and (5) the military judge apparently tailored a punishment of “time served” to allow for continued mental health treatment.¹⁹⁴

It is difficult to assess the actual impact of *Riddle*. First, military judges would be wise not to read *Riddle* as a license to take shortcuts during a providence inquiry.¹⁹⁵ The “totality of the circumstances” standard is, by definition, very fact-dependent, so minor factual differences during plea inquiries may result in different results on appeal. Military judges should still liberally advise an accused of potential defenses to avoid issues on appeal, even after *Riddle*. Second, servicemembers are under remarkable stress from

¹⁸³ *Riddle*, 67 M.J. at 339 (citing *Shaw*, 64 M.J. at 462).

¹⁸⁴ *Id.* at 340–41.

¹⁸⁵ See *United States v. Johnson*, 65 M.J. 919 (C.G. Ct. Crim. App. 2008) (“Defense counsel’s naked concessions are not a substitute for the requirement to conduct a meaningful inquiry into any affirmative defense raised by the record, and to ascertain from the accused himself whether his pleas are fully informed and voluntary.”).

¹⁸⁶ *Riddle*, 67 M.J. at 339 (emphasis added).

¹⁸⁷ *Id.* at 342 (Effron, C.J., & Erdmann, J., dissenting).

¹⁸⁸ Of note, Chief Judge Effron and Judge Erdmann also dissented from the majority in *Shaw*. See *United States v. Shaw*, 64 M.J. 460, 464–67 (C.A.A.F. 2007) (Effron, C.J., & Erdmann, J., dissenting).

¹⁸⁹ *Riddle*, 67 M.J. at 340 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253–54 (C.M.A. 1969)).

¹⁹⁰ *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Phillippe*, 63 M.J. 307, 310–11 (C.A.A.F. 2006)).

¹⁹¹ *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *Phillippe*, 63 M.J. at 310–11; *United States v. Inabinette*, 66 M.J. 320, 322–23 (C.A.A.F. 2008)).

¹⁹² *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Harris*, 61 M.J. 391, 398 n.13 (C.A.A.F. 2005)). *Harris* reads:

At this juncture the military judge had two options. He could have inquired whether Appellant still wished to plead guilty, now aware of a possible affirmative defense based on mental illness. Alternatively, the military judge could have advised the convening authority that a substantial basis in law and fact now existed to question whether Appellant’s pleas were provident.

Harris, 61 M.J. at 398 n.13.

¹⁹³ *Riddle*, 67 M.J. at 343 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)).

¹⁹⁴ *Id.* at 341–42 (Effron, C.J., & Erdmann, J., dissenting).

¹⁹⁵ See Huestis, *supra* note 36, at 32 (“Military judges must be meticulous and, if necessary, take extra time on the record to clarify potential issues—or even reject improvident pleas at trial—rather than invite further litigation on appeal.”).

routine deployments in Iraq and Afghanistan.¹⁹⁶ Guilty plea inquiries will continue to raise mental health issues as these deployments continue. Third, *Riddle* is consistent with the trend among appellate courts, which are generally reluctant to set aside otherwise complete providence inquiries based on mental health issues raised during the inquiry.¹⁹⁷ This aversion is heightened when the alleged mental health problems are raised after trial.¹⁹⁸

Finally, the opinion is a valiant but ultimately failed attempt to reconcile this case with prior case law. The accused was in an in-patient psychiatric facility at the time of trial. As set forth in the dissenting opinion, there was a great deal of evidence of a possible mental responsibility defense (as opposed to a “mere possibility” of a defense). The military judge did not explain the potential defense to the accused; rather, he relied on statements from the accused, who was being treated in an in-patient psychiatric facility, defense counsel’s lay opinion, the military judge’s observations at the guilty plea, and a mysterious letter from a psychiatrist, who was not part of a sanity board. The court considered and ultimately rejected another defense raised in a guilty plea this term.

In a more reasoned opinion, the CAAF found the “mere possibility” of a self-defense claim did not make an accused’s plea of guilty improvident. In *United States v. Yanger*,¹⁹⁹ the accused pled guilty to involuntary

manslaughter for killing his wife during an argument about his cocaine use. According to the accused’s providence inquiry, his wife had a broken stem from a stemware glass in her hand; he tried to take a cell phone she was holding and accidentally cut his hand on the stemware.²⁰⁰ The accused said his wife approached him aggressively, with her shoulders hunched, and the accused shoved her.²⁰¹ She stumbled and stabbed herself in the neck with the glass stem, which caused her to bleed to death.²⁰² The Coast Guard Court of Criminal Appeals (CGCCA) reversed the case based on this statement from the accused: “In—in the situation I was in, sir, I just wanted—I just wanted her out of my face with the glass.”²⁰³ In a per curiam opinion, the CAAF reversed and upheld the accused’s guilty plea.²⁰⁴

The *Yanger* opinion noted that in *United States v. Prater*,²⁰⁵ “this court rejected the ‘mere possibility of conflict’ standard for the more realistic ‘substantial basis’ test.” Once the “possibility” of a defense was raised, the military judge properly questioned the accused to decide if a defense was raised.²⁰⁶ Specifically, the military judge clarified that the accused was not scared, was not concerned his wife would use the stemware against another person, and did not believe he was acting in self-defense.²⁰⁷ Based on the accused’s responses, the military judge was not required to explain the elements of self-defense to the accused.

¹⁹⁶ See generally Lieutenant Colonel Edye U. Moran, *A View from the Bench: The Guilty Plea—Traps for New Counsel*, ARMY LAW., Nov. 2008, at 65 (“[P]roblems 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.”); Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144 (2009) (advocating that defense attorneys consider alternative techniques for counseling clients with PTSD).

¹⁹⁷ See *United States v. Sajdak*, No. S31433, 2009 WL 440198 (A.F. Ct. Crim. App. Feb. 24, 2009) (unpublished) (“A military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the sanity defense. A military judge is not required to inquire further when the appellant makes reference to a mental condition but does not raise it as a defense.”) (citing *United States v. Shaw*, 64 M.J. 460, 463 (C.A.A.F. 2007)) (emphasis added).

¹⁹⁸ Cf. *United States v. Curtis*, No. 37072, 2009 WL 136871 (A.F. Ct. Crim. App. Jan. 6, 2009) (unpublished). Before trial, a sanity board evaluated the accused pursuant to RCM 706 and concluded he was not suffering from a severe mental disease or defect at the time of trial or at the time of the charged offenses. The board also noted it had specifically ruled out a diagnosis of Post Traumatic Stress Disorder. The accused then pled guilty to several assaults of his wife. In post-trial confinement, a social worker diagnosed the accused with PTSD. On appeal, the accused argued he would not have pled guilty had he known he had PTSD. Relying on *Harris*, *Shaw*, and *Inabinette* (all discussed above), the AFCCA concluded the post-trial evidence of PTSD showed an inconsequential severity so it was “nothing more than a mere possibility of a defense.”

¹⁹⁹ 67 M.J. 56 (C.A.A.F. 2008) (per curiam).

²⁰⁰ *Id.* at 57.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* According to the CAAF: “Focusing on these words, a majority of the Court of Criminal Appeals concluded that *Yanger*’s colloquy raised the defense of self-defense and that the military judge failed to conduct an appropriate inquiry. The court set aside the involuntary manslaughter conviction because of this ‘unresolved self-defense issue.’” *Id.* (citing *United States v. Yanger*, 66 M.J. 534, 537–38 (C.G. Ct. Crim. App. 2008)).

²⁰⁴ *Id.* at 58. The Coast Guard Judge Advocate General certified this issue for appeal: “Whether the Coast Guard Court of Criminal Appeals erred by finding that the accused raised sufficient facts during the plea inquiry requiring the military judge to explain self-defense.” *Id.* at 56.

²⁰⁵ 32 M.J. 433 (C.M.A. 1991).

²⁰⁶ *Yanger*, 67 M.J. at 57.

²⁰⁷ *Id.* The CAAF favorably noted this exchange during the providence inquiry:

MJ: Did you think at that point that – that she was threatening you in any way?

ACC: No, sir.

MJ: Were you scared?

ACC: No, sir.

MJ: Did you think that she might use the stemware against [others]?

ACC: No, sir.

Id. (alteration in original).

The CGCCA opinion reflects the same factual findings regarding self-defense as the CAAF decision. The CGCCA wrote the case was “replete with statements, details, and questions that address the *possibility* of self-defense” and it was clear that the parties and the military judge “viewed the issue of self-defense as *lingering at the fringes* of the case.”²⁰⁸ Assuming the CGCCA’s conclusions were correct, this would be a mere possibility of a defense. This case is similar to others this term in giving a special status to affirmative defenses including self-defense²⁰⁹ and voluntary intoxication²¹⁰ in a guilty plea, essentially requiring the defense counsel raise the issue.

These cases suggest two trends, one obvious and one hidden between the lines. In the obvious trend, appellate courts are going to great lengths to uphold the providence of guilty pleas. In *Riddle*, a narrow majority opinion ignored stipulated facts and statements by the accused that raised an unresolved defense of lack of mental responsibility. In *Nance*, the CAAF searched through a stipulation of fact to find the factual predicate for the accused’s plea when the accused’s statements to the court fell short. In a less obvious

²⁰⁸ *Yanger*, 66 M.J. at 537 (emphasis added).

²⁰⁹ See *United States v. Brady*, No. 20070888, 2008 CCA LEXIS 577, at *3 (A. Ct. Crim. App. Nov. 26, 2008) (per curiam) (unpublished), *review denied*, 68 M.J. 146 (C.A.A.F. 2009). Similar to *Yanger*, defense argued on appeal that a guilty plea to battery was not provident because the military judge did not advise the accused of self-defense. The military judge asked a series of “yes” or “no” questions that effectively showed the defense was not raised. *Id.*

²¹⁰ See *United States v. Hollmann*, No. 200900226, 2009 WL 2599350 (N.M. Ct. Crim. App. Aug. 25, 2009) (unpublished). The accused pled guilty to several offenses, including housebreaking. Per the plea inquiry, the accused was drunk after having several glasses of wine at a Marine Corps Ball; when he left the ball, he pulled into a gas station to fill up his truck. The gas station was closed so the accused, “still wearing his Marine Corps dress blue uniform,” threw a rock through a glass door and entered the gas station. *Id.* at *1. On appeal, the defense argued the plea was improvident because the accused was intoxicated and, therefore, unable to form the intent to commit a criminal offense (the specification stated the accused intended to commit “larceny and willful spoiling of nonmilitary real property”). During the inquiry, the accused gave some conflicting reasons for entering the building. Defense counsel noted that “because he was intoxicated, he might not have as clear a recollection at this time as to what he actually intended to do and what intent he formed and when it was formed.” *Id.* at *2. Citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) for the substantial basis test, the NMCCA found no substantial basis in law or fact for questioning the plea. According to the stipulation of fact, the accused entered the gas station intending to “commit larceny and/or to damage property, such as the glass door.” *Id.* at *1. By contrast, during the providence inquiry, the accused said his intent was “[d]estruction of his [the owner’s] property, the ATM, lottery, cash register, and wirings [sic].” *Id.* (alterations supplied by the court). The military judge later asked, “So, the reason that you think you are guilty of this offense [housebreaking] then was simply because you had the intent to do damage to the store before you went in there?” *Id.* The accused responded, “Yes, ma’am.” *Id.* On appeal, the court considered the entire record of trial and concluded the stipulation of fact and the statements during the providence inquiry were sufficient to show no substantial basis in law or fact to reverse. The court ruled it was not significant that the accused said during the inquiry that he might have entered to turn on the gas pumps; once the accused made that claim, the military judge properly resolved the potential inconsistency.

trend, the courts seem to be moving the burden of establishing the accused’s providence from the military judge to the defense counsel. As discussed in *Nance*, the CAAF criticized the accused, using italics, for arguing on appeal that there was not enough information elicited “*from Appellant*” to sustain the plea.²¹¹ The *Riddle* opinion also split the burden for resolving a potential defense, noting that when mental responsibility is at issue, “the military judge and other officers of the court each has the independent responsibility to inquire into the accused’s mental condition.”²¹² Echoing this trend, the ACCA went so far as to argue in dicta that the accused has an obligation to raise applicable defenses at a guilty plea: “Though we do not find this case to present a close call for the military judge, we take this opportunity to remind parties that *the accused, at trial, bears the burden to raise defenses where applicable*, and not rely on appellate review to seek them out.”²¹³ This second trend is significant. If the defense counsel bears some of the burden to raise and resolve defenses, appellate courts can more easily affirm cases in which the military judge may have failed to adequately advise the accused of a defense. This trend undercuts Article 45(a) and *United States v. Care*, which direct the military judge to advise the accused and ultimately safeguard the guilty plea.²¹⁴

IV. Pretrial Agreements

Near the end of *Footloose*, the town pastor addresses his congregation during Sunday morning service. After listening to Ren recite scripture about dancing to the city council and after stopping a local book burning, Reverend Moore realizes he has to give the kids a chance to learn and grow and even make mistakes:

I’m standing up here before you today with a very troubled heart. You see, my friends, I’ve always insisted on taking responsibility for your lives. But, I’m really like a first-time parent who makes mistakes and tries to learn from them. And like that parent, I find myself at that moment when I have to decide. Do I hold on or do I trust you to yourselves? . . . If we don’t start trusting our children, how will they ever become trustworthy?²¹⁵

²¹¹ *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (emphasis supplied by the court).

²¹² *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing MCM, *supra* note 14, R.C.M. 706(a)).

²¹³ *Brady*, 2008 CCA LEXIS 557, at *3.

²¹⁴ See *Riddle*, 67 M.J. at 343 (Effron, C.J. & Erdmann, J., dissenting) (“The providence inquiry centers on the special relationship between the accused and the military judge, not between the accused and counsel.”).

²¹⁵ FOOTLOOSE, *supra* note 1.

After choking back his emotions, Reverend Moore convinces his parish to let the high school kids have a dance in a warehouse outside of town.²¹⁶ Military judges and appellate courts have the same struggle in reviewing pretrial agreements. When an accused agrees to a term, when should the military judge intervene to protect the defense? When can the Government withdraw from the agreement? This term, military courts gave practitioners some latitude to make—and hopefully learn from—their mistakes.

A. Overview

A pretrial agreement is a “constitutional contract” between the convening authority and the accused.²¹⁷ In a typical agreement, the accused agrees to forego constitutional rights in exchange for a benefit, normally a reduction in sentence.²¹⁸ As a result, when interpreting pretrial agreements, contract principles outweigh protections afforded to the accused under the Due Process Clause.²¹⁹ Under RCM 910(f)(4), “The military judge shall inquire to ensure: (A) That the accused understands the agreement; and (B) That the parties agree to the terms of the agreement.”²²⁰ The military judge must also ensure that the agreement conforms to RCM 705 and that the accused has freely and voluntarily entered into the agreement and waived constitutional rights.²²¹

To ensure the accused understands the pretrial agreement, the military judge must discuss the terms with the accused as well as the consequences of those terms. In *United States v. Coker*,²²² the accused’s pretrial agreement included the following term: “I further agree to enroll in and

successfully complete the sex offender treatment program available to me, wherever confined, to the extent I am sentenced to confinement sufficient for enrollment in, and completion of, the sex offender treatment program.”²²³ The military judge explained this term to the accused as follows: “If you are, in fact, confined to a length of time that would be sufficient for you to complete the sex offender treatment program, then you’re agreeing to enroll in it.”²²⁴ The military judge did not mention the “successfully complete” language.²²⁵

The CGCCA held, “In a case involving a pretrial agreement, the military judge must conduct an inquiry, *including an explanation of each material provision*, to ensure that the accused understands the agreement and agrees to it, and that any ambiguities are clarified so that the parties share a common understanding of the agreement.”²²⁶ The court ruled the military judge did not satisfy the RCM 910(f) requirement as he did not inform the accused of the significant requirements of sex offender treatment.²²⁷

In guarded language, the Coast Guard court explained, “One might posit that the terms of such a program agreement are present, though submerged, in the pretrial agreement. If so, arguably they must be part of the inquiry required under R.C.M. 910(f).”²²⁸ The court continued later in the opinion, “However, to the extent that obligations associated with enrollment in the treatment program went wholly unmentioned during the trial, it could not be said that there was an adequate inquiry into the sex offender treatment provision of the pretrial agreement.”²²⁹ However, the court found the error to be harmless, as the Government conceded on appeal the convening authority could not withdraw from the agreement if the accused failed to “successfully complete” a sex offender treatment program.²³⁰

²¹⁶ *Id.*

²¹⁷ *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

²¹⁸ *Id.* (quoting *Lundy*, 63 M.J. at 301).

²¹⁹ *Id.* (quoting *Lundy*, 63 M.J. at 301). *See also* *United States v. Grisham*, 66 M.J. 501, 505 (A. Ct. Crim. App. 2008) (“Generally, pretrial agreements will be strictly enforced based upon the express wording of the agreements; however, ‘[w]hen interpreting pretrial agreements contract principles are outweighed by the Constitution’s Due Process Clause protections for an accused.’”) (quoting *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)).

²²⁰ MCM, *supra* note 14, R.C.M. 910(f)(4). *See also id.* R.C.M. 910(f)(4) discussion (“If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused’s understanding of any terms in the agreement, the military judge should explain those terms to the accused.”).

²²¹ *Smead*, 68 M.J. at 59 (citing UCMJ art. 45(a) (2008); MCM, *supra* note 14, R.C.M. 705; R.C.M. 910(f), (h)(2), (h)(3); *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003)). *See* MCM, *supra* note 14, R.C.M. 705(c)(1)(B) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.”).

²²² 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

²²³ *Id.* at 575.

²²⁴ *Id.*

²²⁵ *Id.* at 575 n.7.

²²⁶ *Id.* at 575 (citing MCM, *supra* note 14, R.C.M. 910(f); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004)) (emphasis added).

²²⁷ *Id.* at 576. According to a prosecution exhibit, the sex offender treatment program would require the accused admit responsibility for his offenses, discuss the details of his misconduct, and follow other program guidelines. *Id.* On appeal, the defense submitted a separate affidavit from the U.S. Disciplinary Barracks, where the accused was confined post-trial and during the appeal. *Id.* According to the affidavit, there are “three treatment series” requiring a “total of at least fifty-five sessions.” *Id.* n.8.

²²⁸ *Id.* at 576.

²²⁹ *Id.*

²³⁰ *Id.* at 577. The pretrial agreement required the accused enroll in sex offender treatment and, if he later failed to do so, the convening authority could vacate suspension of punishment. *Id.* To the extent the accused later “encounters an obstacle to his enrollment in sex offender treatment,” the remedy would be to petition the court for relief at that time. *Id.*

As a practice point, the *Coker* court noted the military judge could have conducted a complete inquiry under RCM 910(f) by discussing “summarized information” about the treatment program, like the contents of the prosecution exhibit, with the accused.²³¹ The court expressly rejected a defense argument that the military judge was required to discuss all the program terms with the accused, which included significant additional requirements for treatment.²³²

B. Pretrial Agreement Terms

Three recent cases addressed novel issues in interpreting pretrial agreement terms. The three cases considered the scope of a “waive all waivable motions” provision, read a possible *sub rosa* term into a pretrial agreement, and decided whether charges dismissed under a pretrial agreement continue to be dismissed if the guilty plea is set aside on appeal.

In the first case, the CAAF endorsed the “waive all waivable motions” provision in pretrial agreements and broadly interpreted its scope. In *United States v. Gladue*,²³³ the accused pled guilty and agreed to “waive any waiveable [sic] motions” pursuant to a pretrial agreement. At trial, the military judge asked the defense what motions were waived by this provision; defense counsel stated the only contemplated motions were for a continuance, suppression of evidence, change of venue, and entrapment, and did not mention multiplicity or unreasonable multiplication of charges.²³⁴ On appeal, the defense argued for the first time that certain charges should be dismissed for multiplicity or, alternatively, an unreasonable multiplication of charges.²³⁵ In an opinion authored by Judge Stucky, a three-judge majority found the accused waived those issues for appellate review by virtue of a “waive all waivable motions” provision.²³⁶

By way of providing a legal framework, the opinion asserted, “The granted issue arises out of the failure of military courts to consistently distinguish between the terms ‘waiver’ and ‘forfeiture.’”²³⁷ The CAAF quoted the

following from the Supreme Court: “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”²³⁸ When an issue is merely forfeited, an appellate court will review for plain error; if an accused waives a right at trial, it is “extinguished” and will not be reviewed on appeal.²³⁹ The Supreme Court has held that a defendant may waive many fundamental constitutional protections.²⁴⁰ Similarly, a military accused may waive challenges based on double jeopardy, the basis for a multiplicity objection.²⁴¹ By contrast, unreasonable multiplication of charges is not grounded in the Constitution, but rather a “presidential policy.”²⁴² Hence, an accused can waive both multiplicity and unreasonable multiplication of charges in a pretrial agreement. In this case, the accused knowingly waived all waivable motions, which included multiplicity and unreasonable multiplication of charges.²⁴³ According to the majority, it was not relevant that the defense did not contemplate these potential motions at trial.²⁴⁴

Judge Baker wrote a separate opinion, joined by Chief Judge Effron, concurring in the result, arguing that an accused must waive certain rights expressly and on the record, as opposed to the majority’s broad presumption of waiver derived from a blanket “waive all waivable motion” term.²⁴⁵ The concurring opinion correctly noted, “Generally, waivers of fundamental constitutional rights, including protection from double jeopardy, must be ‘knowing, intelligent, and voluntary.’”²⁴⁶ In this case, the concurring opinion noted there was no express waiver of the “double jeopardy claims.”²⁴⁷ To the contrary, the accused waived all

²³¹ *Id.* at 576.

²³² The CGCCA discussed an affidavit admitted on appeal that added significant requirements on the accused to compete sex offender treatment:

According to the affidavit, there are three treatment series that are prerequisite to sex offender treatment, comprising a total of at least fifty-five sessions. The frequency of these sessions is not stated. Hence it is unclear whether Appellant has likely reached the enrollment point; he almost surely had not reached it by the time his brief was filed.

Id. n.8.

²³³ 67 M.J. 311 (C.A.A.F. 2009).

²³⁴ *Id.* at 313.

²³⁵ *Id.* at 312.

²³⁶ *Id.*

²³⁷ *Id.* at 313 (citing *United States v. Harcrow*, 66 M.J. 154, 156 n.1 (C.A.A.F. 2008)).

²³⁸ *United States v. Olano*, 507 U.S. 725, 733 (1993), quoted in *Gladue*, 67 M.J. at 313 (internal quotations omitted).

²³⁹ *Gladue*, 67 M.J. at 313.

²⁴⁰ See *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”), quoted in *Gladue*, 67 M.J. at 314.

²⁴¹ *Gladue*, 67 M.J. at 314.

²⁴² *Id.* (citing *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)).

²⁴³ *Id.*

²⁴⁴ *Id.* (“Admittedly, motions relating to multiplicity and unreasonable multiplication of charges were not among those subsequently discussed by the military judge and the civilian defense counsel. However, this does not affect the validity of the waiver.”).

²⁴⁵ See *id.* at 314–17 (Baker, J. & Effron, C.J., concurring in the result). The concurring opinion ultimately agreed with the result, as the charges were not facially duplicative or an unreasonable multiplication of charges. *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result).

²⁴⁶ *Id.* at 314–15 (Baker, J. & Effron, C.J., concurring in the result) (quoting *Ricketts v. Adamson*, 483 U.S. 1, 23 (1987)).

²⁴⁷ *Id.* at 315 (Baker, J. & Effron, C.J., concurring in the result) (noting the record did not show the accused “knowingly, voluntarily, and intelligently waived his double jeopardy claims”). The concurring opinion seemed to initially consider both multiplicity and unreasonable multiplication of

waivable motions but the military judge inquired about the term and “delimited that waiver by cataloguing the specific motions and issues waived.”²⁴⁸ The military judge noted four motions that defense counsel was waiving and then said to the accused, “Knowing what your defense counsel and I have told you, do you want to give up making those motions in order to get the benefit of your pretrial agreement?”²⁴⁹ In the context of this limited waiver of specific motions, the concurring opinion further noted, “an accused cannot silently waive appellate review of plain error.”²⁵⁰

The concurring opinion suggested that an accused should clearly waive motions to avoid confusion: “Waiver of waivable motions should be done on the record and expressly. Otherwise, the military judge and appellate courts will not be in a position to assess whether the waiver is knowing and voluntary.”²⁵¹ While the concurring opinion does not expand on this idea, its analysis implies the two judges believe an accused should be advised that waiving all waivable motions extends to issues that are normally reviewed on appeal even if not raised at trial (to include plain error). The concurring opinion would likely advocate for an extensive advisement from the military judge that resolves any ambiguity about issues that are preserved for appeal; without such an advisement, the accused should be allowed to litigate motions that otherwise survive a guilty plea. If the accused believed the military judge’s

charges as double jeopardy assertions. *See id.* (Baker, J. & Effron, C.J., concurring in the result). However, later in the opinion, the concurrence noted only multiplicity is grounded in on the constitutional principle of double jeopardy, while unreasonable multiplication is designed to guard against prosecutorial overreaching. *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result) (quoting *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)).

²⁴⁸ *Id.* at 315 (Baker, J. & Effron, C.J., concurring in the result).

²⁴⁹ *Id.* (Baker, J. & Effron, C.J., concurring in the result) (quoting from the record of trial).

²⁵⁰ *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result) (citing *United States v. Branham*, 97 F.3d 835, 842 (6th Cir. 1996); *United States v. Lloyd*, 46 M.J. 19, 22 (C.A.A.F. 1997)). *Cf.* *United States v. McClary*, 68 M.J. 606, 611 (C.G. Ct. Crim. App. 2010) (“Plain error analysis is not required where an appellant intentionally waives a known right at trial.”) (citing *Gladue*, 67 M.J. 311).

²⁵¹ *Gladue*, 67 M.J. at 316. (Baker, J. & Effron, C.J., concurring in the result). *See also* *United States v. Brehm*, No. 20070688, 2009 CCA LEXIS 183 (A. Ct. Crim. App. May 13, 2009) (unpublished). The accused pled guilty to indecent liberties with a child for an offense committed in 1999; charges were not forwarded until October 2006. *Id.* at *2. At that time, the CAAF had not decided whether or a newly-adopted child abuse exception to the five-year statute of limitations applied retroactively. *Id.* *Cf.* *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (holding the 2003 amendment to Article 43, UCMJ, which excepted child abuse offenses from the five-year statute of limitations, does not apply retroactively). At the *Brehm* guilty plea, the military judge asked the accused if he intended to waive a possible statute of limitations challenge from “any hypothetical ruling” by the CAAF. *Brehm*, 2009 CCA LEXIS 183, at *3. The ACCA ruled that the military judge exceeded his authority by adding an additional term to the pretrial agreement (specifically, waiver of a potential statute of limitation defense). *Id.* The court noted it would have had “less concern” if the pretrial agreement expressly discussed a “bargained-for waiver of a hypothetical future defense.” *Id.*

advisement in this case, the only motions waived involved a continuance, suppression of evidence, change of venue, and entrapment. The concurring opinion is correct that such an advisement did not accurately explain the pretrial agreement.

Gladue has an expansive scope.²⁵² Appellate courts will now interpret a pretrial agreement term that the accused will “waive all waivable motions” to affirmatively waive virtually all issues on appeal.²⁵³ The change moves closer to federal practice, in which prosecutors routinely require a defendant waive all motions (as well as appellate review) in pretrial agreements.²⁵⁴ Similarly, the second Report of the Commission on Military Justice, chaired by CAAF Senior Judge Walter T. Cox III, made a tempered recommendation that the President consider amending RCM 705(c)(1)(B) to allow an accused to waive appellate review in a pretrial agreement, a waiver that is currently prohibited under the rule.²⁵⁵ Nonetheless, practitioners should be wary of adding boilerplate language that purports to waive motions when no motions are actually contemplated.²⁵⁶

In the second recent case addressing pretrial agreement provisions, *United States v. Molina*,²⁵⁷ the CGCCA held the Government had agreed to an unwritten promise in a pretrial agreement that the accused would not be required to register as a sex offender. During pretrial negotiations, trial and defense counsel researched federal and state law as well as

²⁵² *See generally* *United States v. Martinez*, ACM 37176, 2009 WL 1508451 (A.F. Ct. Crim. App. Apr. 7, 2009) (unpublished) (holding “waive all waivable motions” provision waives appellate challenge for vindictive prosecution).

²⁵³ Based on the CAAF’s conclusion that an accused can affirmatively waive constitutional rights, arguably the only issues that survive this provision are jurisdiction and failure to state an offense. It is an open issue whether a “waive all waivable motions” provision would extend to the statute of limitations. *See* *United States v. Province*, 42 M.J. 821 (N-M. Ct. Crim. App. 1996) (no waiver of statute of limitation defense “unless an accused, on the record, voluntarily and expressly waives the statute of limitations as bar to trial”).

²⁵⁴ *See generally* *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam) (providing framework for enforcing waiver of appellate rights).

²⁵⁵ REPORT OF THE COMMISSION ON MILITARY JUSTICE 8 (Oct. 2009) (“R.C.M. 705(c)(1)(B) could be amended, or superseded by an amendment to the UCMJ, to permit the waiver of appellate review to become part of a pretrial agreement. The change would also move the military justice system toward the elimination of ‘no-issue’ appeals, which do little to promote justice but consume scarce resources . . .”). The *Report* cautioned that appellate review was created “to guarantee appellate review to persons convicted by a military, rather than a civilian, court.” *Id.* The Commission argued any such change should be cautiously considered: “We think it likely that the military justice system has matured to the point that such a guarantee is no longer required, but we recommend that the President amend the rule only after careful consideration of the overall military appellate structure.” *Id.* at 9.

²⁵⁶ *See* Moran, *supra* note 196, at 63 (“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.’”).

²⁵⁷ 68 M.J. 532 (C.G. Ct. Crim. App. 2009).

Secretary of the Navy Instruction 5800.14A to determine if the accused would have to register as a sex offender if he pled guilty.²⁵⁸ Based on that research, counsel believed only one offense, indecent assault, would trigger sex offender registration; the Government agreed that the accused could plead guilty to assault consummated by battery (vice indecent assault), which the parties believed would avoid sex offender registration.²⁵⁹ After trial, counsel learned that California, the state in which the accused planned to reside, had a bifurcated reporting regime and by pleading guilty to indecent exposure as required by the pretrial agreement, the accused would register as a sex offender on a non-public list.²⁶⁰ The CGCCA decided the parties had agreed that the accused would not have to register as a sex offender and this provision was a material term in the pretrial agreement; the remedy was to dismiss the charge that triggered registration as a sex offender.²⁶¹ Of note, this decision relied largely on concessions of the appellate Government counsel, so the opinion likely has limited precedential value.²⁶²

The opinion hinges on an erroneously expansive interpretation of pretrial agreements, founded on a set of well-accepted principles. First, interpreting the terms of a pretrial agreement is a question of law that is reviewed de novo on appeal.²⁶³ Second, the meaning of a pretrial agreement is based on the plain letter of its terms as well as the accused's "understanding" of those terms as shown in the record.²⁶⁴ Applying this legal framework, the Coast Guard court uncovered the "understanding" based on a post-trial affidavit from the accused claiming he would have pled not guilty had he known he would have to register as a sex offender.²⁶⁵ In a separate affidavit, trial counsel only conceded that sex offender registration "was a subject of the pre-trial negotiations" but not that it was a term of the

agreement.²⁶⁶ Based on these post-trial affidavits and Government concessions on appeal,²⁶⁷ the CGCCA concluded sex offender registration was "the [accused's] primary concern" in agreeing to plead guilty, that he would not have pled guilty but for his misunderstanding of this issue, and that the matter was a "material term" of the agreement.²⁶⁸

For this legal conclusion, the Coast Guard court cites no authority. For the accused to prevail, the court was required to find the unwritten sex offender provision was a material term and the parties' mistaken belief that the accused would not have to register as a sex offender evinced a mutual misunderstanding of that term.²⁶⁹ Regarding the court's conclusion that an unwritten material term existed, the facts do not support this determination. As set forth above, the Government only conceded that the parties discussed whether the accused would have to register as a sex offender as a collateral consequence of his plea.²⁷⁰ Even more important, it is unclear in the opinion if the Government conceded that the convening authority, or anyone acting as his representative, actually promised the accused that the plea would not trigger sex offender registration.

²⁶⁶ *Id.* The Government's answer brief read, "The Appellant made it clear during the pre-trial negotiations that he was concerned about pleading guilty to *any offense* constituting a sex offense." *Id.* (emphasis in original). The Government's answer later (and similarly) noted, "As a result, sex offender registration was a subject of the pre-trial negotiations." *Id.*

²⁶⁷ The CGCCA also claimed the "record as a whole" supports these conclusions, though that does not seem to be the case. *See id.* at 534. The military judge did not discuss sex offender registration during the guilty plea and no one claimed at trial that the pretrial agreement was drafted to ensure the accused would not have to register as a sex offender. *Id.* at 535 ("[T]he issue of sex offender registration never came up during the providence inquiry.")

²⁶⁸ *Id.*

²⁶⁹ *Id.* (citing *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003)).

²⁷⁰ Courts are loathe to reverse cases based on collateral consequences of a guilty plea or punishments adjudged at trial. *See United States v. Carson*, No. 200600994, 2008 CCA LEXIS 393 (N-M. Ct. Crim. App. Nov. 6, 2008) (unpublished), *review denied*, 2009 CAAF LEXIS 616 (C.A.A.F. June 11, 2009). The accused pled guilty to offenses relating to indecent acts and language with two of his daughters. *Id.* at *1. His pretrial agreement included this term: "Further, that after sentence is announced in this case, there should no longer be a need for the military protective order, and that I will be allowed contact with my entire family, if they so desire." *Id.* at *4. After trial, the accused was transferred to a confinement facility that does not allow minors to visit convicted sex offenders. *Id.* On appeal, the NMCCA found this agreement to be unambiguous. *Id.* at *5. However, the court found the accused's limited access to his children was a collateral consequence of his conviction and confinement. *Id.* at *6-7. Applying the three part-test from *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982), the NMCCA concluded it was not reasonable to believe the language of the agreement would foreseeably cause the accused to misunderstand consequences of confinement. *Carson*, 2008 CCA LEXIS, at *7. The NMCCA affirmed. *Id.* at *15. *See Bedania*, 12 M.J. at 376 (holding an appellate court will only set aside a guilty plea based on collateral consequences if "collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct the misunderstanding.")

²⁵⁸ *Id.* at 533.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 535.

²⁶² *Id.* at 533 ("Appellant asserts, that his decision to plead guilty to the charges . . . was based on assurances that he would not have to register as a sex offender. The Government agrees . . .").

²⁶³ *Id.* (citing *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)). *See also United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) ("[I]nterpretation of the agreement is a question of law, subject to review under a de novo standard.") (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

²⁶⁴ *Molina*, 68 M.J. at 534 ("Nonetheless, 'In the context of pretrial agreements involving the constitutional rights of a military accused, we look not only to the terms of the agreement, or contract, but to the accused's understanding of the terms of an agreement as reflected in the record as a whole.'") (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). To emphasize the point, the court inserts the same quotation from *Lundy* on the next page of the opinion. *See id.* at 535 n.4 (quoting *Lundy*, 63 M.J. at 301).

²⁶⁵ *Id.* at 534.

To make its factual leap, the court relied on the pleas themselves: “This agreement on the modified plea to Charge V, in our view, represents the efforts of the parties to meet Appellant’s concern to avoid any requirement to register as a sex offender, underscoring, for this Court, the fundamental validity of the assertions in the post-trial affidavits.”²⁷¹ The court gives no authority for this circular conclusion; the decision found that the Government allowed the accused to plead in such a way to address his “concern” about sex offender registration, which bolstered a legal conclusion that the parties added a material, unwritten term that the accused would not have to register as a sex offender. There is also no authority given for concluding that a trial counsel’s opinion on the state of the law for sex offender registration equates to a promise in a pretrial agreement. The court also failed to analyze this unwritten promise as a *sub rosa* agreement, which is prohibited by the *Rules for Courts-Martial* and highly disfavored on appeal.²⁷² Put another way, appellate courts are justifiably suspicious of defense claims that unwritten terms are part of a written pretrial agreement, and logic suggests that counsel would normally reduce material terms to writing (particularly if the accused would have pled not guilty in the absence of such a promise).

For a number of reasons, the import of *Molina* is questionable. Government counsel can correctly argue the case is limited to its unique facts. To support that claim, practitioners should point to the court’s reliance on Government concessions, particularly regarding the nature of the pretrial negotiations; the Coast Guard’s reliance on these concessions was so pronounced the court added this footnote: “The Court commends the Government for making the concessions in this case.”²⁷³ Defense counsel should note that pretrial negotiations frequently include discussions of collateral consequences and may argue that trial counsel opinions on potential consequences are part of a pretrial agreement. To avoid this potential challenge, practitioners would be wise to give guarded legal conclusions when discussing consequences of a plea with opposing counsel. A literal reading of *Molina* gives some authority to extend such legal conclusions into binding

²⁷¹ *Molina*, 68 M.J. at 534.

²⁷² See MCM, *supra* note 14, R.C.M. 805(d)(2) (discussing pretrial agreements and mandating, “All terms, conditions, and promises between the parties shall be written.”). The CAAF has explained the sound rationale for prohibiting such *sub rosa* agreements:

The terms of the agreement should be understood by all parties to the agreement to permit full disclosure at trial and to allow a full inquiry by a judge. The substance of these agreements must be in writing. Thus, the primary goal of RCM 705 is to preclude misunderstandings about the terms of an agreement and to prohibit *sub rosa* agreements.

United States v. Jones, 52 M.J. 60, 66 (C.A.A.F. 1999) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, Drafters’ Analysis, at A21-39 (1995)).

²⁷³ *Molina*, 68 M.J. at 534 n.2.

pretrial agreement terms. Government appellate counsel should be cautioned against making such generous concessions, as they can lead to unfavorable precedent. Finally, trial counsel and convening authorities should not accept pretrial agreement provisions that promise the accused will not register as a sex offender; no one has the power to limit state and federal registration schemes and the law in this area is routinely changing.²⁷⁴

In the third recent development in this area, military courts have considered whether charges dismissed pursuant to a pretrial agreement may be resurrected after appellate review sets aside the guilty plea. In *United States v. Smead*,²⁷⁵ the accused pled guilty at two courts-martial. At his first trial, the accused pled guilty to possession of child pornography and indecent acts with a child.²⁷⁶ Pursuant to an approved pretrial agreement, the accused pled not guilty to three other child pornography specifications and a single rape specification, and the Government agreed to “withdraw” those offenses.²⁷⁷ Later in the agreement, the parties agreed that once the sentence was announced, “the withdrawn language and/or charge(s) and specification(s) will be dismissed with prejudice by the convening authority.”²⁷⁸ The agreement further provided that the convening authority would suspend the accused’s rank reduction for six months and direct the accused to serve his confinement at Miramar Base Brig; the Government failed to comply with these two terms and, after two service court decisions, the accused was allowed to withdraw from the agreement.²⁷⁹ At the second court-martial, the Government

²⁷⁴ This opinion might have been better decided based on ineffective assistance of counsel. See *United States v. Rose*, 67 M.J. 630 (A.F. Ct. Crim. App. 2009) (reversing guilty plea to indecent assault offenses because defense counsel was ineffective by implying the accused would not have to register as a sex offender; note, defense counsel did not make that statement expressly, but suggested it by downplaying the seriousness of the offenses and saying he “didn’t see why” such conviction would trigger sex offender registration). For a summary of how varying UCMJ offenses trigger state sex offender registration, see Major Andrew D. Flor, *Sex Offender Registration Laws and Uniform Code of Military Justice*, ARMY LAW., Aug. 2009, at 20–23 (listing registration requirements for all fifty states based on court-martial conviction).

²⁷⁵ 68 M.J. 44 (C.A.A.F. 2009).

²⁷⁶ *Id.* at 47.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 47, 51. In *Smead I*, the NMCCA found the convening authority did not comply with the pretrial agreement and remanded the case. The court split the two terms. Regarding the provision about confinement at Miramar, the NMCCA remanded with three options for the convening authority. The NMCCA wrote:

The CA may (1) set aside the findings and sentence and if appropriate authorize a rehearing; or (2) grant specific performance by securing the appellant’s transfer to the MCAS Miramar Brig, so that the appellant can participate in the 2-year sexual offender rehabilitation course; or (3) provide alternative relief that is satisfactory with the appellant.

re-referred all charges and specifications, including those that were dismissed with prejudice at the first guilty plea.²⁸⁰ The accused moved to dismiss the offenses that were withdrawn at the first trial; the military judge denied the motion and the accused eventually pled guilty.²⁸¹ The CAAF issued an opinion joined by three judges concluding the Government improperly re-referred the dismissed charges, though the error was ultimately harmless based on the unique facts of this case.²⁸² A separate opinion, authored by Judge Ryan and joined by Judge Erdmann, concurred in the judgment but argued the Government had the authority to re-refer all charges.²⁸³

The lengthy opinion ultimately rests on two simple points. First, in the initial pretrial agreement, parties agreed certain charges would be dismissed with prejudice once the sentence was announced; the record of trial is “replete” with evidence that the parties agreed the charges would be withdrawn with prejudice, which is significant as charges may be withdrawn without prejudice under RCM 604.²⁸⁴ Hence, the parties agreed to dismiss charges with prejudice, which had the prevented further prosecution for those offenses.²⁸⁵ Second, the new pretrial agreement was more favorable than the one in the initial case, including thirty-six months less confinement and one less guilty plea to a child pornography specification, so the error was harmless.²⁸⁶ Put another way, while the military judge erred by allowing the Government to re-refer the withdrawn charges, the error was harmless because the accused was found not guilty of those offenses and received a more favorable sentence limitation.

The concurring opinion argued that the Government was actually within its rights to re-refer the withdrawn

charges. The analysis was straightforward. First, the concurring opinion reasoned that dismissing the charges with prejudice was a material term in “a legally binding and enforceable contract.”²⁸⁷ Second, when there is a misunderstanding to a material term in an agreement (as in this case), specific performance is not available, and the parties cannot agree on alternate relief, the pretrial agreement is nullified and the parties should be returned the status quo ante.²⁸⁸ Once this pretrial agreement was nullified, the term requiring the Government to dismiss was no longer binding and all charges could be re-referred.

Smead is useful for settling the law on the limited issue of re-referral of charges after a guilty plea is reversed on appeal. This case also teaches trial counsel to be wary of terms the convening authority may be unable to enforce. In this case, the convening authority had no authority to direct the accused serve his sentence to confinement at Miramar; non-compliance with this (arguably) minor term allowed the accused to withdraw his guilty plea and triggered significant appellate litigation.

C. Government Withdrawal from Pretrial Agreements

In a significant opinion, the CAAF ruled that once the accused begins performance of *any* promise in an approved pretrial agreement, the Government may only withdraw in very limited circumstances. In *United States v. Dean*,²⁸⁹ on the eve of trial, the Government withdrew from a pretrial agreement because the accused refused to modify the stipulation of fact to include new, post-pretrial misconduct. In a 4-1 decision relying on RCM 705(d)(4), the CAAF held the convening authority was not allowed to withdraw.²⁹⁰ Under RCM 705(d)(4)(B), the Government may only withdraw from a pretrial agreement in limited circumstances: (1) before an accused begins performance of promises under the pretrial agreement; (2) upon accused’s failure to fulfill any “material promise” in the pretrial agreement; or (3) when inquiry by the military judge discloses a disagreement as to a “material term” in the agreement.²⁹¹ While not applicable to this case, the rule also

Smead I, 60 M.J. 755, 758 (N-M. Ct. Crim. App. 2004). Regarding the rank reduction, the court did not find the term affected the providence of the accused’s plea, but ordered the convening authority to take corrective action. In *Smead II*, the NMCCA wrote a brief decision that the convening authority had not complied with the initial order regarding the accused’s rank reduction; the court set aside findings and sentence and returned the case. *Smead II*, No. 200201020 (N-M. Ct. Crim. App. June 22, 2005) (unpublished). In the current case, the Government re-referred all charges from the original court-martial. *Smead*, 68 M.J. at 47.

²⁸⁰ *Smead*, 68 M.J. at 51.

²⁸¹ *Id.* at 51–52.

²⁸² *Id.* at 52.

²⁸³ *Id.* at 66–67 (Ryan & Erdmann, JJ., concurring in the judgment).

²⁸⁴ *Id.* at 61 (noting “the convening authority agreed to withdraw and dismiss specified charges with prejudice upon announcement of the sentence”); 63 (concluding “the record of trial is replete with references to withdrawal with prejudice”). See MCM, *supra* note 14, R.C.M. 604(b) (noting that withdrawn charges may be referred anew to another court-martial).

²⁸⁵ *Smead*, 68 M.J. at 65 (noting on “the unique circumstances of this case,” the agreement required dismissal with prejudice and there was no authority for treating this provision as “a mere temporary disposition of the affected charges subject to revival at a rehearing”).

²⁸⁶ *Id.* at 66.

²⁸⁷ *Id.* at 67 (Ryan & Erdmann, JJ., concurring in the judgment).

²⁸⁸ *Id.* at 68 (Ryan & Erdmann, JJ., concurring in the judgment) (citing *United States v. Perron*, 58 M.J. 78, 87 (C.A.A.F. 2003)). “Status quo ante” is defined as “[t]he situation that existed before something else (being discussed) occurred.” BLACK’S LAW DICTIONARY 1448 (8th ed. 2004). The service court opinion provided this definition: “‘Status quo ante’ literally means ‘the state of things before.’” *United States v. Smead*, No. 200201020, 2008 WL 142112, at *5 (N-M. Ct. Crim. App. Jan. 10, 2008) (quoting BLACK’S LAW DICTIONARY 1410 (6th ed. 1990)).

²⁸⁹ 67 M.J. 224 (C.A.A.F. 2009).

²⁹⁰ *Id.* at 225–26. Judge Baker filed a dissenting opinion. *Id.* at 231–32 (Baker, J., dissenting).

²⁹¹ MCM, *supra* note 14, R.C.M. 705(d)(4)(B). On its face, the rule delineates between “material” and other terms and promises in an agreement. The Government may withdraw if the accused fails to perform, but only when the failure involves a “material” promise or condition. The

allows for withdrawal if findings are set aside on appeal because the plea was improvident.²⁹²

The *Dean* court found the accused began performance by (1) signing the stipulation of fact, (2) electing trial by military judge alone, and (3) filing an amended witness list that conformed to a condition in the pretrial agreement.²⁹³ Of note, the accused signed the stipulation of fact and elected trial by military judge alone *before* the convening authority approved the pretrial agreement.²⁹⁴ Hence, once the convening authority approved the offer to plead guilty, the Government could only withdraw under RCM 705(d)(4)(B) if the accused failed to perform or there was a disagreement to a material term. On appeal, the Government first argued the parties had a disagreement regarding a material term, specifically the “before I begin performance” provision in the agreement.²⁹⁵ The CAAF quickly dismissed this argument, noting the Government did not rely on that basis for withdrawal at trial and noted the phrase was essentially a term of art defined in the context of interpreting RCM 705.²⁹⁶ The Government next made the novel argument that the agreement carried “an implied obligation of good faith.”²⁹⁷ The CAAF quickly dismissed this argument as well, reasoning that RCM 705(c)(2)(D) expressly allows for a pretrial agreement term that requires the accused not commit other misconduct, so a provision allowing such a term to be added necessarily means that “good conduct” is not an implicit term in pretrial agreement.²⁹⁸ Finally, and perhaps most compellingly, the Government argued the pretrial agreement allowed for

cancellation if there was “any modification of the stipulation without my [the accused’s] consent.”²⁹⁹ The CAAF dismissed this argument—perhaps too quickly—noting that this term was “not a model of clarity” and a separate provision in the agreement only required the accused agree to a stipulation of fact regarding the offenses to which he was pleading guilty.³⁰⁰ Hence, the Government could not withdraw from the pretrial agreement when the accused refused to modify the stipulation of fact to include uncharged misconduct.³⁰¹

Judge Baker dissented from *Dean*, making two valid critiques.³⁰² First, regarding the CAAF’s conclusion that the accused had begun performance by signing the stipulation of fact and electing trial by military judge alone before the agreement was submitted to the Government, the dissent argued, “[I]t is not clear how Appellant could, as a matter of law, begin performing on a contract that had not yet been signed by the convening authority.”³⁰³ The dissent argued more persuasively that the pretrial agreement allowed for modification of the stipulation of fact, a term that could have allowed for the Government to withdraw.³⁰⁴ Specifically, the agreement noted “this agreement may be cancelled” if the accused did not agree with trial counsel to the contents of a stipulation of fact or if there was “any modification of the stipulation without my consent.”³⁰⁵ Judge Baker read these terms together to mean “any modification to the stipulation on which the parties could not agree would cancel the agreement.”³⁰⁶ Hence, when the Government sought to add new misconduct to the stipulation (as a modification) and the accused did not agree, the agreement was cancelled.

Government may also withdraw if there is a disagreement about a term, but only if the term is “material.” By contrast, the Government may not withdraw after the accused begins performance of promises in the agreement; this portion of the rule does not require the promises be “material.”

²⁹² *Id.*

²⁹³ *Dean*, 67 M.J. at 228. Per the pretrial agreement, accused agreed to waive the personal appearance of three named military witnesses and to request production of no more than two non-local defense witnesses. *Id.* at 226. On 8 July 2005, the accused elected trial by military judge alone. *Id.* at 228. On 29 August 2009, he submitted the offer to plead guilty with a signed stipulation of fact. *Id.* at 225, 228. On 14 September 2005, the convening authority approved the offer to plead guilty. *Id.* at 226.

²⁹⁴ *Id.* at 227.

²⁹⁵ *Id.* at 228.

²⁹⁶ *Id.* at 228, 229. The court noted that RCM 705(d)(4)(B) uses the phrase “before the accused begins performance of promises contained in the agreement.” *Id.* at 229. To the extent this issue was raised at trial, the military judge only applied it in the context of interpreting RCM 705(d)(4)(B), and trial counsel did not assert the parties disagreed to its meaning. *Id.* In harsh language, the court determined, “[T]he only reason the Government withdrew was because *Dean* refused to modify the stipulation of fact to include additional misconduct.” *Id.*

²⁹⁷ *Id.* at 229.

²⁹⁸ *Id.* at 230. See also *United States v. Cox*, 46 C.M.R. 69, 70 (C.M.A. 1972) (“We are unable to adjudge that the pretrial agreement carries with it an implied condition that the Government will be bound only if the appellee behaves well.”), quoted in *Dean*, 67 M.J. at 230.

²⁹⁹ *Dean*, 67 M.J. at 230.

³⁰⁰ *Id.*

³⁰¹ *Id.* The court added, “As such, the modification proposed by the Government to include recent acts of alleged misconduct in the stipulation is outside the scope of the parties’ agreement.” *Id.*

³⁰² *Id.* at 231–32 (Baker, J., dissenting).

³⁰³ *Id.* at 231 (Baker, J., dissenting).

³⁰⁴ *Id.* (Baker, J., dissenting).

³⁰⁵ *Id.* (Baker, J., dissenting).

³⁰⁶ *Id.* (Baker, J., dissenting).

those bases as possible in front of the military judge. An appellate court will skeptically view arguments that were available at trial but raised for the first time on appeal. Finally, trial counsel should consider requiring misconduct provisions in pretrial agreements. In this case, the Government would have been allowed to withdraw if a term like the following had been in the agreement: “If I commit any misconduct (to include any act that violates the UCMJ) 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.”

VIII. Conclusion

At the end of *Footloose*, Ren and his friends host a dance for the high school in a warehouse outside of town. In a way, the kids are bending the rules; knowing dancing is outlawed in town, they go just a few miles away with the approval of their parents. All the kids move like trained, choreographed, professional dancers. Once the rules are pushed aside, the kids can cut loose and do the “moonwalk,” glide in sync, and have impromptu dance-offs.³⁰⁷ Unfortunately, when appellate courts cut loose, the results can be inconsistent and occasionally unsightly.

There was much to admire from the last term’s cases. The NMCCA affirmed a military judge’s decision to reject an accused’s irregular guilty plea,³⁰⁸ while the ACCA affirmed a military judge’s decision to reject a guilty plea in one of the high-profile Abu Ghraib cases based on inconsistent matters raised by the defense during sentencing.³⁰⁹ These decisions will hopefully encourage military judges to reject questionable (or “close call”) guilty pleas in which an accused has ambiguously asserted his guilt. The NMCCA highlighted a military judge’s duty to properly advise an accused of the elements of the offenses to which the accused is pleading guilty, as well as the challenging legal concepts that must be defined during the providence inquiry to ensure the accused truly understands the plea.³¹⁰ Finally, the CAAF issued a well-reasoned opinion limiting the Government’s ability to withdraw from a pretrial agreement once the accused begins performance of any portion of the agreement.³¹¹ These four decisions represent the strong tradition in military justice of protecting an accused, first, by ensuring a plea of guilty is only

accepted if the accused is truly guilty and understands the full meaning and effect of the plea, and second, by scrutinizing Government actions in guilty pleas to prevent overreaching.

Other cases were more of a mixed bag. The CAAF’s two decisions regarding convening authority disqualification ultimately reached the correct result but downplayed the importance of this legal principle.³¹² In another opinion, the CAAF determined an accused may add a promise to “waive all waivable motions” in a pretrial agreement; while this term may allow an accused to negotiate a more favorable sentence limitation, the CAAF has interpreted the term so broadly that it approaches a waiver of appellate review.³¹³ The CAAF’s decision on waiving all waivable motions even expanded the waiver to cover motions that were not contemplated at trial.³¹⁴ As a counterbalance, the CGCCA has recently noted that service courts can review waived issues under the broad authority of Article 66(c), UCMJ.³¹⁵

Unfortunately, two cases warrant some criticism. *United States v. Nance*, a case in which leading questions were used to get the accused to admit that his abuse of cough and cold medicine was prejudicial to good order and discipline, will likely be cited for years to come for its general derision of the military guilty plea process.³¹⁶ The CAAF’s implied frustration that the “Appellant argues that the military judge failed to illicit, *from Appellant*, a sufficient factual basis to establish that Appellant’s conduct was to the prejudice of good order and discipline in the armed forces”³¹⁷ may resonate with other frustrated members of the judiciary who review a litany of guilty plea cases. However, this criticism runs contrary to congressional statutes governing guilty pleas, as well as rules promulgated by the President.³¹⁸

Even more troubling, *United States v. Riddle* relied on questionable legal and factual conclusions to uphold a guilty plea of a mentally ill Soldier who was not advised of the

³⁰⁷ FOOTLOOSE, *supra* note 1.

³⁰⁸ *United States v. Diaz*, No. 200700970, 2009 WL 690614 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished), *review granted*, 68 M.J. 200 (C.A.A.F. 2009).

³⁰⁹ *United States v. England*, No. 20051170, 2009 CCA LEXIS 349 (A. Ct. Crim. App. Sept 10, 2009) (unpublished).

³¹⁰ *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009), *aff’d*, 68 M.J. 399 (C.A.A.F. 2009).

³¹¹ *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009).

³¹² *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009); *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009).

³¹³ *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009); *see also supra* notes 252–56 and accompanying text.

³¹⁴ *See supra* notes 234, 243–44 and accompanying text.

³¹⁵ *See United States v. McClary*, 68 M.J. 606, 611 n.7 (C.G. Ct. Crim. App. 2010) (“At a federal Court of Appeals, plain error analysis of an intentionally waived issue is not available at all, because a valid waiver leaves no error for us to correct on appeal. However, under Article 66(c), UCMJ, this Court may entertain an issue despite waiver.”) (internal quotations and citations omitted). *See also* UCMJ art. 66(c) (2008) (“[The Court of Criminal Appeals] may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”).

³¹⁶ *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009).

³¹⁷ *Id.* at 365 (emphasis supplied by the court).

³¹⁸ *See* UCMJ art. 45 (2008); MCM, *supra* note 14, R.C.M. 910(c)–(e).

applicable defense of lack of mental responsibility.³¹⁹ The CAAF concluded that the accused's multiple mental health conditions, which resulted in her living in an in-patient psychiatric facility at time of trial, only amounted to the mere possibility of a defense. While this conclusion is certainly problematic, the opinion may be more significant for ever-so-slightly shifting the burden of the providence inquiry from the military judge to defense counsel.³²⁰ Consistent with the court's growing waiver doctrine, future cases may allege that the defense waives challenges to the providence of a guilty plea by not raising those issues at trial. Such a shift would imprudently undercut the "special relationship between the accused and the military judge"³²¹ during the providence inquiry that has long served to ensure a military guilty plea is aligned with the truth.

Military judges are in the best position to safeguard the providence of an accused's plea. Despite the recent appellate cases upholding slipshod plea inquiries, military judges should continue to fully advise military accused and ensure factual discrepancies and possible defenses are

addressed at the trial level. To the extent inconsistencies between the accused's plea of guilt and the providence inquiry cannot be resolved, military judges have a duty to not accept the plea and instead enter a plea of not guilty for the accused.

Last summer, Paramount Studios announced that it was re-making *Footloose* for a "new generation." While it is hard to imagine the film could be improved, filmmakers seem to believe the great aspects of the original can be captured again. In the same way *Footloose* is being re-made, practitioners and military judges should endeavor to modify and expand caselaw to strengthen the review of accuser disqualification issues and guilty pleas.

³¹⁹ *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009).

³²⁰ *See supra* notes 184, 212 and accompanying text.

³²¹ *Riddle*, 67 M.J. at 343 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)).