

Bulletproof¹ Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal

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Introduction

“Be careful that victories do not carry the seed of future defeats.”³ This article attempts to apply this sage advice by examining some of the common seeds of appellate defeat sown during the course of a trial. The intent of this article is to identify several of the more frequent trial errors with the expectation that counsel will recognize and thus avoid them or, at the very least, mitigate any appellate impact. While even astute practitioners cannot avoid all the issues that may have a potential impact on appeal, counsel can recognize common pitfalls and take appropriate measures to protect the record and minimize the risk of appellate relief. While it would be presumptuous to assume that this article will cover all, or even most, of the common errors, it will attempt, at the very least, to identify those that can be most readily avoided or corrected.

Standards of Review and Findings of Fact

While not an article on appellate standards of review, it would be productive to briefly examine these standards in order to better understand the measures suggested herein and how to “protect the record”⁴ for appeal.

Appellate review is a three-step process during which the reviewing court will assess: (1) whether there is an error;⁵ (2) whether the party claiming error preserved the issue for appeal;⁶ and, when required, (3) whether the error had an effect on the trial.⁷ With certain exceptions,⁸ an appellant is entitled to relief only if, in the absence of plain error,⁹ the party did not waive or forfeit the error¹⁰ and the error materially prejudiced a substantial right of the accused.¹¹ The last-mentioned requirement, assessing prejudice, while relevant to the trial practitioner, is beyond the scope of this article. The second requirement, preserving the issue for appeal, is generally not in the interest of the Government,¹² except when the Government itself seeks to raise the issue through an interlocutory appeal.¹³ Rather, the goal for the trial practitioner is to avoid errors in the first instance and “protect the record,” ensuring that the military judge’s decision, when favorable to the Government, is sustained on appeal.

Whether the military judge’s ruling will be upheld depends upon on the issue involved and the “standard of review” applied by the appellate court, i.e., whether the error involves a constitutional or non-constitutional right and how much

¹ Bulletproof: “not subject to correction, alteration, or modification.” Merriam-Webster OnLine; <http://www.merriam-webster.com/dictionary/bulletproof> (last visited Apr. 28, 2008).

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⁴ “Protect the record” refers to the practice of introducing sufficient facts or offers of proof into the record along with the necessary legal theory and authorities supporting a particular issue that would sustain the military judge’s decision on appeal, without resort to extraordinary appellate action.

⁵ *United States v. Olano*, 507 U.S. 725, 732–33 (1993) (defining “error” as a “deviation from a legal rule”).

⁶ See *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 905(e) (2008) [hereinafter MCM] (failure to raise a defense, objection, motion, or request in a timely manner will constitute waiver); *Id.* MIL. R. EVID. 103(a) (failure to object to erroneous ruling waives the error absent plain error).

⁷ UCMJ art. 59(a) (2008).

⁸ See *United States v. Reynolds*, 49 M.J. 260 (C.A.A.F. 1998) (structural defect is presumed to be prejudicial); *United States v. Meek*, 44 M.J. 1, 6 (C.A.A.F. 1996) (defining a “structural defect” as a defect “which renders any trial unreliable and unfair”).

⁹ *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998) (applying a three part “plain error” test to determine material prejudice in situations where the error is forfeited due to a party’s failure to bring the matter to the attention of the military judge); see *United States v. Baker*, 57 M.J. 330, 337 (C.A.A.F. 2002) (Crawford, J., dissenting) (suggesting a fourth factor in the plain error analysis: “error seriously affect[ing] the fairness, integrity, or public perception of judicial proceedings”) (citations omitted).

¹⁰ *Olano*, 507 U.S. at 733 (“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.’”) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

¹¹ UCMJ art. 59(a).

¹² See *United States v. Reynoso*, 65 M.J. 208 (C.A.A.F. 2008) (finding defense’s general “foundation” objection, without more specificity, either expressed or implied from the context of the objection, will forfeit later appellate challenges, absent plain error).

¹³ See UCMJ art. 62; MCM, *supra* note 6, R.C.M. 908.

deference the appellate court will give to the military judge's ruling. The more deference given to the military judge's ruling, the less likely an appellate court will overturn that ruling. Military judges' decisions are a product of the application of the historical facts of the case to the relevant law or legal standard.¹⁴ For matters of law, appellate courts will review a judge's decision "de novo."¹⁵ The court will give no deference to the military judge and will substitute its own judgment in order to determine whether he applied the correct legal standard to the issue presented. In these circumstances the practitioner should ensure that the record clearly reflects: (1) the law, standard, or authority being applied by the military judge; and, (2) the party who has the burden of production or proof for the specified issue.¹⁶ While it is best for the military judge to reduce his legal findings to writing and attach those to the record, it is not always practical or necessary. Therefore, trial counsel should press the military judge to state on the record the legal basis for this ruling.

Issues of fact, however, remain the focus of the trial counsel's practice. Unlike matters of law, factual determinations or "findings of fact,"¹⁷ with certain exceptions, are reviewed under a "clearly erroneous standard."¹⁸ Thus, the military judge's findings of fact will be afforded substantial deference by the reviewing court unless those findings are fanciful, arbitrary, or unsupported by the facts contained in the record.¹⁹ Provided there is "some evidence" in the record to support the military judge's factual determinations, the factual predicate for his decisions will not be disturbed by appellate authorities.²⁰ So, counsel must develop a factual record in support of the Government's position and secure findings of fact by the military judge that reflect the basis for the military judge's ruling. That way, upon review, the appellate courts will be bound by those facts.²¹ This trial practice protects the judge's decision by restricting the appellate court's review of the specified issue to those facts contained in the military judge's findings of fact.²²

The importance of a well-developed factual record accompanied by specific findings of fact from the military judge cannot be overstated. As a matter of competent trial practice, counsel should, with few exceptions,²³ provide the military judge with proposed findings of fact in writing. This not only frames the issue for the military judge from the Government's perspective but also serves as an invaluable tool in preparing for motion practice. Most often, because of poor planning, practitioners rely on argument as ersatz evidence during the litigation of a motion. Argument, however, is not evidence and cannot substitute for the facts necessary to support one's position or the military judge's decision.²⁴ The military judge needs

¹⁴ See *Ornelas-Ledesma v. United States*, 517 U.S. 690, 696–97 (1996) (Application of the historical facts of the case to the relevant legal standard is know as mixed questions of law and fact. "The historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.") (alternations in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

¹⁵ *Bose Corps. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984) (defining "de novo" review as an "original appraisal of all the evidence" in order for the court to decide for itself whether the judgment or decision is correct); *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) (questions of law are reviewed *de novo*).

¹⁶ See *MCM*, *supra* note 6, R.C.M. 905(c) (burden and assignment of proof generally on moving party); *United States v. Brandell*, 35 M.J. 369, 372 (C.M.A. 1992). To avoid waiver, objecting party had burden to identify the specific grounds for challenge to evidence unless "all parties at trial fully appreciate the substance of the defense objection and the military judge has full opportunity to consider it." *Id.*

¹⁷ *MCM*, *supra* note 6, R.C.M. 905(d) ("Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."); see *United States v. Salinas*, 65 M.J. 927, 929 (N-M. Ct. Crim. App. 2008) (absence of sufficient findings of fact to support the military judge's opinion would "[o]rdinarily . . . require a rehearing or return of the record to the military judge for entry of complete essential findings.") (citing *United States v. Doucet*, 43 M.J. 656, 659 (N-M. Ct. Crim. App. 1995)).

¹⁸ *United States v. Harris*, 66 M.J. 166, 168 (C.A.A.F. 2008) ("[W]e defer to the military judge's findings of fact . . . where they are not clearly erroneous.") (citations omitted).

¹⁹ *United States v. Leedy*, 65 M.J. 208, 212–13 (C.A.A.F. 2007); see *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (finding that the legal and factual review by the appellate court is limited to the matters contained in the record of trial, that is those introduced at trial and not from those outside the record, such as during the Article 32, UCMJ, investigation).

²⁰ *Leedy*, 65 M.J. at 212–13.

²¹ *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004) (appellate courts bound by military judge's findings of fact unless they are clearly erroneous).

²² *Culombe v. Conn.*, 367 U.S. 568, 603 (1961) ("[A]ll testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat* . . . we are not to be bound by findings wholly lacking support in evidence."); *Dowty*, 60 M.J. at 171 ("[W]e are bound by the military judge's findings of fact unless they are 'clearly erroneous.'") (citation omitted).

²³ Of course, there are practical and tactical reasons for not providing the military judge with findings of fact such as when the issue could not be foreseen prior to trial or because the proponent of the motion does not wish to disclose the full factual basis to opposing counsel prior to litigation.

²⁴ *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983).

facts.²⁵ When challenged on appeal, the appellate court needs findings of fact in order to assess whether the military judge abused his discretion.²⁶ Done appropriately, findings of fact, supported by the record, will bind the appellate court during review.²⁷

Lessons to be Learned: In order to preserve a ruling favorable to the Government, the record must support the military judge's findings of fact. This is the trial counsel's responsibility. The military judge's findings must logically support both the appropriate inferences derived from the facts and the application of the appropriate legal standard. There is no substitute for proffering written findings of fact. As an advocacy tool, the findings provide the military judge with a means to rule in the Government's favor and, as a practical matter, supply the necessary foundation for the military judge's decision during appellate review.

Pretrial Agreements

Forfeiture Provisions and the Accused's Benefit of His Bargain

From the Government's perspective, one of the most troubling issues in recent years is dealing with the breach of the pretrial agreement forfeiture provisions, which is epitomized by the decision in *United States v. Perron*.²⁸ These breaches arise when the convening authority, pursuant to the terms of a pretrial agreement, agrees to take mitigating action by providing some measure of relief from the automatic forfeiture or reduction in pay grade provisions of the Uniform Code of Military Justice (UCMJ),²⁹ or from forfeitures or reduction adjudged as part of the accused's sentence. This is done, presumably, out of concern for the financial security of the accused's family especially during any period of the accused's confinement. Unfortunately, after trial, the parties learn that the financial benefits intended cannot or will not be realized due to some intervening factor, such as when the accused is beyond his enlisted contract obligation, when the accused is indebted to the Government,³⁰ or when the accused's military pay is affected due to incorrect interpretations of law and regulations.³¹

In *Perron*, the accused was convicted, pursuant to his pleas, of wrongful use and possession of a controlled substance.³² He was sentenced to a bad conduct discharge, ninety days confinement, and reduction to pay grade E-3. Pursuant to a pretrial agreement, the convening authority agreed to suspend all confinement in excess of sixty days for a period of six months, and waive all automatic forfeitures for the benefit of Perron's family during the period of his confinement.³³ Unbeknownst to the parties, the accused's enlistment had expired prior to trial, which placed him in a no-pay status upon confinement.³⁴ Thus, his family did not receive the financial benefits intended by the parties and memorialized within the pretrial agreement. On remand, to provide Perron with the benefit of his bargain, the convening authority disapproved all confinement, which allowed Perron to receive pay for the previously approved and executed period of confinement.³⁵ Not satisfied with the outcome, during the second appeal Perron claimed that the timing of the payments, as well as the amount, were material terms of the agreement.³⁶ Because his family was not paid during the period of his confinement, Perron asserted that he had

²⁵ Not all facts in support of a proponent's position need to be in the form of admissible evidence. See MCM, *supra* note 6, MIL. R. EVID. 401(a).

²⁶ *United States v. Salinas*, 65 M.J. 927 (N-M. Ct. Crim. App. 2008) ("[W]e note that when factual issues are involved in determining a motion, the military judges are to state essential findings on the record. . . . Ordinarily [a failure to do so would] require a rehearing or return of the record to the military judge for entry of complete essential findings.") (citing *United States v. Doucet*, 43 M.J. 656, 659 (N-M. Ct. Crim. App. 1995)).

²⁷ *Dowty*, 60 M.J. at 171.

²⁸ *Perron III*, 58 M.J. 78 (C.A.A. F. 2003).

²⁹ UCMJ arts. 58(a), (b) (2008) (statutorily mandated reduction in pay grade and forfeiture of pay and allowances based upon the application of certain court-martial punishments).

³⁰ *E.g.*, *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987); *United States v. Flores*, No. 200501199, 2007 CCA LEXIS 73 (N-M. Ct. Crim. App. Mar. 15, 2007).

³¹ *E.g.*, *United States v. Lundy (Lundy I)*, 58 M.J. 802 (A. Ct. Crim. App. 2003), *aff'd* 63 M.J. 299 (C.A.A.F. 2006) (misinterpretation of transitional assistance legislation and its effect on forfeiture provisions within the pretrial agreement); *United States v. Mitchell*, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. 2000), *rev'd*, 58 M.J. 251 (C.A.A.F. 2003) (misinterpretation of agency regulations regarding enlistment extensions and its effect on forfeiture provisions of the pretrial agreement).

³² *Perron III*, 58 M.J. 78.

³³ *Id.* at 79.

³⁴ *United States v. Perron (Perron I)*, 53 M.J. 774, 774-75 (C.G. Ct. Crim. App. 2000), *rev'd*, 58 M.J. 78 (C.A.A.F. 2003).

³⁵ *United States v. Perron (Perron II)*, 57 M.J. 597, 598 (C.G. Ct. Crim. App. 2001), *rev'd*, 58 M.J. 78 (C.A.A.F. 2003).

³⁶ *Id.*

not received the expected benefit of his bargain, which was the basis for his guilty pleas. Guilty pleas, which waive certain fundamental constitutional rights,³⁷ must be made knowingly and voluntarily.³⁸ Since the parties were mistaken as to the financial consequences of the guilty pleas, Perron asserted that his pleas were improvident and required the court to set aside the findings and sentence.³⁹ Attempting again to provide Perron with the full benefit of his intended bargain, the Coast Guard Court of Criminal Appeals took further remedial action on the sentence.⁴⁰

The subsequent appeal to the Court of Appeals for the Armed Forces (CAAF) went beyond prior precedent⁴¹ and agreed with Perron, finding that even in the absence of express terms dealing with time, the timing of payment was material to the pretrial agreement.⁴² Thus, due to the mutual misunderstanding by the parties, Perron's pleas were not knowingly and voluntarily made, rendering them not provident.⁴³ In such circumstances there exist only three remedial options: (1) the court can order specific performance of the pretrial agreement terms; (2) the court can set aside the finding and sentence and allow the accused to withdraw his guilty pleas; or, (3) the court can provide some alternative relief.⁴⁴ From the Government's perspective, having the court fashion alternative relief was the most preferred option if specific performance was not otherwise available.⁴⁵ Despite early precedent giving broad discretion to the appellate courts to fashion such remedies,⁴⁶ the *Perron* court all but eliminated that option. The CAAF found that any alternative remedial action imposed on an unwilling accused "intrudes upon an [accused's] decision to plead guilty" and may "result in erroneous conclusions of voluntariness."⁴⁷ Since a guilty plea waives a variety of constitutional rights, imposing alternative remedies upon the accused without his express consent violates the "knowing and voluntary" requirements of a constitutional guilty plea.⁴⁸ Thus, without the express consent of the accused, alternative remedies are no longer available to remedy the Government's defective performance under the pretrial agreement.⁴⁹

Since Perron did not consent to either the convening authority's or the lower court's alternative remedies, of the two remaining options, specific performance was impossible given the court's reading of a time-of-the-essence term into the forfeiture provisions of the pretrial agreement. Criticism of the court's reasoning aside and the tenuous grounds relied upon to infuse new terms into the pretrial agreement,⁵⁰ the only remaining option was to set aside the findings and sentence and allow the Government to retry the accused if it could do so.⁵¹

One would suspect that the trial defense counsel bears some responsibility for the breach, since he is in the best position to discover the effect administrative matters would have on the terms of the pretrial agreement. The CAAF has addressed defense counsel's responsibility to advise his client concerning the collateral consequences of a guilty plea.⁵² However, the

³⁷ *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver for the fundamental rights to a jury trial, . . . to confront one's accusers, . . . to present witnesses in one's defense, . . . to remain silent, . . . and to be convicted by proof beyond a reasonable doubt . . .") (citations omitted).

³⁸ *Perron II*, 57 M.J. at 598.

³⁹ *Id.* at 599.

⁴⁰ *Id.* (setting aside reduction in grade).

⁴¹ *United States v. Williams (Williams II)*, 53 M.J. 293 (C.A.A.F. 2000) (finding accused's pleas improvident where accused relied upon the incorrect advice by counsel and the military judge concerning the effect his guilty plea would have on the forfeiture provisions of his pretrial agreement); *United States v. Hardcastle*, 53 M.J. 299 (2000) (finding accused's pleas improvident when Government failed to fulfill the terms of the pretrial agreement).

⁴² *Perron III*, 58 M.J. 78, 85 (C.A.A.F. 2003).

⁴³ *Id.*

⁴⁴ *Id.* at 84.

⁴⁵ *Id.*

⁴⁶ See *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987).

⁴⁷ *Perron III*, 58 M.J. at 85.

⁴⁸ *Id.*

⁴⁹ *Id.* at 85–86. *But see* *United States v. Lundy (Lundy II)*, 63 M.J. 299, 304 (2006) (Effron, J., concurring in part and in the result) (regarding lower court's ability to craft a remedy for a breach of the terms of a pretrial agreement, distinction is made between "alternative relief," which requires the consent of the accused, and "adequate remedy," which allows the court to craft a remedy that provides the accused the benefit of his bargain regardless of his consent).

⁵⁰ *Perron III*, 58 M.J. at 86–89 (Crawford, J., dissenting).

⁵¹ *Id.* at 86.

⁵² See *United States v. Williams*, 55 M.J. 302, 307 (C.A.A.F. 2001) ("[C]hief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.") (quoting *United States v. Bendania*, 12 M.J. 373, 376 (C.M.A. 1982)).

court has never held the trial defense counsel directly responsible for failing to recognize that the accused's status or agency regulations would negate the forfeiture provisions of a pretrial agreement.⁵³ While placing blame upon the defense counsel may not change the outcome, as the case may be overturned on an ineffective assistance of counsel claim,⁵⁴ the consequences of failing to provide the accused with the intended financial benefit of his bargain under the pretrial agreement fall squarely on the Government.⁵⁵

Lessons to be Learned: As with other matters discussed in this article, counsel must pay attention to detail. However, there are instances when matters beyond the control of the convening authority arise, especially regarding issues of pay. This can come from an unexpected source such as when the Government recoups its loss, arising either from the offenses for which the accused is charged or from other administrative matters such as a prior overpayment, by withholding some or all of the accused's pay.⁵⁶ What is certain is that the accused, despite the charges and maximum confinement, will claim that but for the forfeiture provisions he would not have entered into the agreement.⁵⁷ The convening authority can no longer presume that the defense counsel, who is in a better position to know of potential pay issues and the financial needs of the accused, will properly advise the accused of the consequences that might affect his pay. When coupled with the court's ability to read time of the essence terms into the pretrial agreement, the consequences of failing to abide by the forfeiture provisions are extreme: finding the pleas improvident and setting aside the conviction.⁵⁸ Therefore, given the complexity of fiscal regulations, the effect of automatic forfeiture and reduction provisions, and the uncertainty of events that legitimately or otherwise may interfere with the accused's pay, perhaps the best approach is to avoid negotiating forfeiture or reduction protection as part of a pretrial agreement. If the convening authority or the accused is concerned about the financial status of the accused or his family, the convening authority always has the option of granting clemency after trial.⁵⁹ Of course the parties must avoid the real or perceived issue of *sub rosa* agreements,⁶⁰ but the convening authority can determine what he would consider as appropriate relief during pretrial negotiations and each convening authority must weigh the individual merits against good order and discipline.⁶¹ By avoiding forfeiture or reduction protections in the pretrial agreement, one eliminates the possibility that events beyond the convening authority's control will interfere with the pretrial agreement and jeopardize the plea on appeal.⁶² Despite attempts to minimize errors and avoid unintended consequences, there is no substitute for a close examination of the terms of a pretrial agreement, a thorough review of the accused's circumstances and status, and a careful plea inquiry by the military judge in order to avoid appellate issues.

Forfeiture or Fine Provisions

A fine may not be approved against the accused unless it is clear that he was aware that a fine could be imposed.⁶³ In *United States v. Norman*,⁶⁴ the court disapproved an adjudged fine due to the ambiguity created by the pretrial agreement provision addressing "Forfeitures or Fines," when the accused was awarded both forfeitures *and* a fine. While the military

⁵³ *E.g.*, *Lundy*, 63 M.J. 299 (internal agency regulations affecting pay).

⁵⁴ *See Williams II*, 53 M.J. 293, 296 (C.A.A.F. 2000) ("Ignorance of the law on a material matter cannot be the prevailing norm in the legal profession or in the court-martial process.").

⁵⁵ *Williams*, 55 M.J. at 306 ("If an accused does not receive the benefit of the bargain reflected in a negotiated pretrial agreement, the pleas will be treated as improvident, the findings will be set aside, and the accused will be subject to retrial.").

⁵⁶ *See United States v. Flores*, No. 200501199, 2007 CCA LEXIS 73 (N-M. Ct. Crim. App. Mar. 15, 2007) (setting aside accused's guilty plea because of the Government's failure to pay the accused in accordance with the implied "time of the essence" terms of the pretrial agreement due, in part, to offsets to the accused pay to recoup previous overpayments).

⁵⁷ *See United States v. Williams (Williams I)*, 49 M.J. 542, 545 (N-M. Ct. Crim. App. 1998), *rev'd*, 53 M.J. 293 (C.A.A.F. 2000).

⁵⁸ *Williams*, 55 M.J. at 306.

⁵⁹ MCM, *supra* note 6, R.C.M. 1107(d).

⁶⁰ *Sub rosa*, "Confidential; secret; not for publication." BLACK'S LAW DICTIONARY 1469 (8th ed. 2004); *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976) (military judge required to inquire into any promises made by the Government in exchange for accused's guilty plea); *United States v. Troglin*, 44 C.M.R. 237, 242 (C.M.A. 1972) (condemn *sub rosa* agreements); MCM, *supra* note 6, R.C.M. 705 (requirement to have all promises between accused and Government in writing).

⁶¹ MCM, *supra* note 6, R.C.M. 705.

⁶² *But see United States v. Capers*, 62 M.J. 268 (C.A.A.F. 2005) (challenging convening authority's clemency action when parties were mistaken as to accused ability to receive pay).

⁶³ *United States v. Williams*, 18 M.J. 186, 189 (C.M.A. 1984).

⁶⁴ No. 200700042, 2007 CCA LEXIS 313 (N-M. Ct. Crim. App. Aug. 8, 2007).

judge did advise the accused that the sentence could include, inter alia, “total forfeitures, a fine, and to be dismissed from the naval service,” the judge did not advise the accused that his financial liability could exceed total forfeiture of pay and allowances—“that is, that a fine could be awarded *in addition to* total forfeitures.”⁶⁵ Since ambiguity in the pretrial agreement is held against the Government, the court disapproved the adjudged fine.

Lesson to be Learned: Caption the forfeiture and fine paragraph in the sentence limitation page⁶⁶ of the pretrial agreement correctly to avoid possible confusion. Further, counsel should ensure that the military judge addresses the prospect of both total forfeitures and a fine, which would exceed total forfeitures at a general court-martial, as a potential sentence. Perhaps, like the position taken above, the simple solution is not to grant relief from forfeiture or fines as part of the pretrial agreement but rather to reserve the right to grant such relief as a matter of clemency.

Guilty Pleas

Two common appellate challenges to an accused’s guilty plea are an inadequate factual basis to support the plea⁶⁷ and matters raised during trial that are inconsistent with the plea, calling into question whether the plea was knowing and voluntary.⁶⁸ With the exception of statutory elements required to establish an offense, which are reviewed de novo,⁶⁹ the military judge’s decision to accept a guilty plea is reviewed during appeal under the deferential abuse of discretion standard.⁷⁰ A guilty plea will not be set aside unless the record demonstrates “a ‘substantial basis’ in law and fact for questioning the guilty plea.”⁷¹ While the accused bears the burden of establishing that a substantial basis exists,⁷² the trial counsel still has a responsibility to protect the record and preserve the accused’s plea on appeal. Thus, he must pay particular attention during the providence inquiry to ensure that the accused admits to every element of the offenses pled, including the requisite intent and theory of culpability,⁷³ and that the military judge addresses and resolves any inconsistencies and defenses during the trial that may give rise to a defense or otherwise call into question the voluntariness of the plea.⁷⁴

Stipulations of Fact

It is axiomatic that before accepting a plea, the military judge must ensure that an adequate factual basis exists to support the plea.⁷⁵ This requires the military judge to conduct a detailed colloquy⁷⁶ with the accused in order to ensure that he understands the meaning and effect of his plea, that it is rendered voluntarily, and that the accused is willing and able to admit the facts necessary to support each element of the offenses pled.⁷⁷

⁶⁵ *Id.* at *9 (emphasis in original).

⁶⁶ MCM, *supra* note 6, R.C.M. 705(d)(2) (an agreement memorializing the specific action to be taken by the convening authority on the adjudged sentence must be set out in a writing separate from other aspects of the agreement).

⁶⁷ *See, e.g.,* United States v. Mitchell, 66 M.J. 176 (C.A.A.F. 2008) (challenge to guilty plea for indecent assault based on accused claim that the record did not reflect the request specific intent element); United States v. Aleman, 62 M.J. 281 (C.A.A.F. 2006) (challenging providence of plea to willfully suffering the sale of military property because inquiry did not establish a factual basis for omission of a certain duty as required by the article).

⁶⁸ Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). In order to be constitutional, a guilty plea must be knowingly, intelligently, and voluntarily made, “with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* (citations omitted).

⁶⁹ United States v. Holbrook, 66 M.J. 31, 32 (C.A.A.F. 2008).

⁷⁰ United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (military judge’s decision to accept guilty plea is reviewed for abuse of discretion and “questions of law arising from the guilty plea [are reviewed] de novo”); United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996).

⁷¹ United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

⁷² United States v. Hays, 62 M.J. 158, 167 (C.A.A.F. 2005).

⁷³ *See* MCM, *supra* note 6, pt. IV, ¶ 1(b) (liability as a perpetrator or other party).

⁷⁴ United States v. Frederick, 23 M.J. 561, 563 n.4 (A.C.M.R. 1986) (“We believe that trial counsel, who have a continuous duty to protect the record, should remain alert throughout a providence inquiry, and respectfully bring to the military judge’s attention any areas which counsel believe have not been sufficiently covered and could result in a plea of guilty subsequently being found improvident.”).

⁷⁵ United States v. Mitchell, 66 M.J. 176 (C.A.A.F. 2008); MCM, *supra* note 6, R.C.M. 910(e).

⁷⁶ United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002) (accused agreement with legal conclusions by the military judge will not support the necessary factual predicate to uphold a plea); United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996); MCM, *supra* note 6, R.C.M. 910(d).

⁷⁷ *Mitchell*, 66 M.J. at 178; MCM, *supra* note 6, R.C.M. 910(c), (d).

One method to secure the factual and legal predicates necessary to sustain a guilty plea is to insist upon a stipulation of fact as part of any pretrial agreement.⁷⁸ The stipulation should be incorporated into the terms of the pretrial agreement and the parties should agree that the evidence contained in the stipulation would be admissible or the accused, with the advice of counsel, affirmatively waives any objection to the stipulation or the information contained therein.⁷⁹ Counsel must exercise due diligence to ensure that the otherwise inadmissible evidence sought to be included within the stipulation of fact is subject to waiver by the accused and will not be challenged on appeal as plain error.⁸⁰ Within the stipulation, counsel should address the way in which the prosecution, sentencing authority, convening authority, and appellate courts may use the information.⁸¹ This includes: (1) during the providence inquiry to determine the sufficiency and basis of the accused's pleas;⁸² (2) as part of the Government's case-in-chief if the Government elects to go forward as to a greater offense or other offenses that rely on the facts in the stipulation;⁸³ (3) as matters in aggravation by the Government;⁸⁴ (4) to approve the findings and sentence by the convening authority and deny or grant clemency as appropriate; and, (5) as part of the review process by the appellate courts.⁸⁵ Counsel must ensure that the military judge addresses the specific uses of the stipulation and clarifies any ambiguities on the record.⁸⁶ Parties should also make clear that the military judge's acceptance of the stipulation is a material term of the pretrial agreement. That way, if the judge refuses to accept any part of the stipulation or the accused objects or seeks to withdraw from the stipulation, either at trial or on appeal, the pretrial agreement will become void.

The stipulation of fact should also clearly state that the agreement and execution of the stipulation by the accused does not amount to the beginning of performance under Rule for Court-Martial (RCM) 705(d)(4)(B), which would otherwise prematurely bind the convening authority to the agreement.⁸⁷ Rather, it should be agreed for the purposes of the stipulation that the beginning of performance occurs when the military judge accepts it.

From the trial counsel's perspective, a well-written stipulation of fact can act as both a sword and a shield. It ensures that all necessary elements are addressed, provides evidence in aggravation, protects the record by securing a factual basis for the plea, and incorporates facts necessary to negate possible defenses. Further, unlike a stipulation of expected testimony,⁸⁸ stipulations of fact bind the parties to the facts stipulated and neither party may introduce contradictory information.⁸⁹ While this limits the defense, it also serves as a trap for the unwary trial counsel and may restrict some aspect of the Government's

⁷⁸ MCM, *supra* note 6, R.C.M. 705(c)(2)(A) (permissible term of a pretrial agreement includes a promise to enter into a stipulation of fact regarding the offense to which the accused will plead guilty).

⁷⁹ *United States v. McCrimmon*, 60 M.J. 145, 154 (C.A.A.F. 2004) ("This Court has stated, assuming no overreaching by the Government, evidence of uncharged misconduct, otherwise inadmissible evidence, may be presented to the court by stipulation and may be considered by the court."); *United States v. Clark*, 53 M.J. 280, 282 (C.A.A.F. 2000) (adding that evidence otherwise inadmissible may be admitted through a stipulation if the "military judge finds no reason to reject the stipulation 'in the interest of justice.'"); *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997); *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990); MCM, *supra* note 6, R.C.M. 811(b) ("The military judge may, in the interests of justice, decline to accept a stipulation.").

⁸⁰ *Clark*, 53 M.J. 280, 282-83 (finding plain error, under MRE 707, when the accused's stipulation, entered pursuant to a pretrial agreement, contained a reference that the accused failed a polygraph); *United States v. Goldberg*, No. 200601093, 2007 CCA LEXIS 8 (N-M. Ct. Crim. App. Jan. 24, 2007) (finding, in dicta, that despite the accused's agreement to enter into a stipulation the military judge has a duty to determine admissibility to ensure the interests of justice are served).

⁸¹ MCM, *supra* note 6, R.C.M. 910 (f)(4) (the military judge had the obligation to ensure that the accused understands and consents to the terms of the pretrial agreement); *see id.* R.C.M. 811(c), prior to accepting stipulation the military judge must be satisfied that the parties consent to its admission.

⁸² *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); *United States v. Redlinski*, 58 M.J. 117, 122 (C.A.A.F. 2003) (finding factual basis for guilty plea may be satisfied by stipulation); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995) (relying on stipulation of fact to provide factual basis necessary for military judge to accept a guilty plea).

⁸³ *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007) (during a guilty plea to an lesser included offense to the charged offense, finding the military judge's failure to advise accused that stipulation of fact could be used as part of the Government's case-in-chief to the greater offense was error).

⁸⁴ *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003) (finding matters in aggravation may be presented through stipulation of fact).

⁸⁵ *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007) (finding a plea improvident, the court used the stipulation of fact to affirm conviction to a lesser included offense).

⁸⁶ *Resch*, 65 M.J. at 237 (finding error in using the stipulation of fact as part of Government's case-in-chief to prove the greater offense, after accused plea of guilty to the less included offense, given the ambiguity concerning how the stipulation of fact would be used).

⁸⁷ *See United States v. Williams*, 60 M.J. 360, 363 (C.A.A.F. 2004) (questions raised whether the accused's execution of a stipulation of fact is beginning performance that would prevent the convening authority from withdrawing from the agreement except on other grounds set out in RCM 705 (d)(4)(B)); *see also United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998) (finding convening authority's ability to withdraw from a pretrial agreement more limited than that of the accused, if a proper withdrawal, convening authority is not bound by prior agreement).

⁸⁸ MCM, *supra* note 6, R.C.M. 811 (e).

⁸⁹ *Id.*; *United States v. Fisher*, 58 M.J. 300, 303 (C.A.A.F. 2003).

case, especially during presentencing.⁹⁰ Astute counsel, however, knows that there is a distinction between evidence that “goes beyond” the stipulated facts and evidence that contradicts those facts: the former is not prohibited.⁹¹ “Stipulations of fact do not prohibit proof of facts which are neither designated nor necessarily implied in the stipulation.”⁹² Thus, in *United States v. Terlep*, the court found that victim’s pre-sentencing testimony⁹³ describing rape did not contradict the stipulation of fact, which supported the guilty plea to the lesser included offense of assault consummated by a battery, since the stipulation did not, expressly or implicitly, rule out the possibility of a rape.⁹⁴

Stipulations of fact are not without limits. A confessional stipulation,⁹⁵ which admits to all elements of a charged offense and amounts to a de facto plea of guilty,⁹⁶ required as part of a pretrial agreement, must be done with care. If the accused cannot or will not plead to certain charges and the Government intends to go forward on those charges, using a confessional stipulation to prove the contested charges must fulfill certain procedural safeguards. A confessional stipulation will not be accepted unless the record reflects: (1) that the accused understands the right not to stipulate; (2) that the stipulation will not be accepted unless the accused consents; (3) that the accused understands the content and effect of the stipulation; (4) that there exists a factual basis for the stipulation; and, (5) that the accused, in consultation with counsel, consents to the stipulation.⁹⁷ While confessional stipulations that follow procedural safeguards are not prohibited, it is error to couple a confessional stipulation with an agreement that prevents the defense from raising any defenses or motions.⁹⁸ Along with the confessional stipulation inquiry, the military judge must also ascertain if there are any agreements between the parties in connection with the stipulation and, if so, the terms of such agreements.⁹⁹

Inconsistencies with the Plea: Mental Responsibility Issues

A common challenge to a guilty plea arises when the accused raises an issue during trial that is inconsistent with his plea of guilty, such as the existence of a defense.¹⁰⁰ Once raised the military judge has the duty to inquire further into the inconsistency in order to resolve the conflict or otherwise reject the plea.¹⁰¹

This often happens when the defense infuses an issue of mental responsibility into the trial, usually in the form of testimony regarding a possible mental disorder during defense’s case in extenuation and mitigation.¹⁰² This is especially salient given the court’s historically preferential treatment of mental responsibility issues¹⁰³ and the mental disorders arising from current combat operations in Iraq and Afghanistan.¹⁰⁴ When confronted with such evidence, if the military judge does

⁹⁰ *United States v. Gerlach*, 37 C.M.R. 3 (C.M.A. 1966) (finding trial counsel’s argument during presentencing, which contradicted facts contained in the stipulation of fact, was error and required setting aside the sentence).

⁹¹ *United States v. Terlep*, 57 M.J. 344, 348 (C.A.A.F. 2002).

⁹² *Id.*

⁹³ MCM, *supra*, note 6, R.C.M. 1001(b).

⁹⁴ *Terlep*, 57 M.J. at 348.

⁹⁵ See MCM, *supra* note 6, R.C.M. 811(c) discussion. A confessional stipulation is a statement of facts “equivalent of a guilty plea, . . . establish[ing] directly or by reasonable inference, every element of a charge offense and when the defense does not present evidence to contest any potential remaining issue of the merits.” *Id.*

⁹⁶ *United States v. Bertelson*, 3 M.J. 314, 316 n.2 (C.M.A. 1977) (“[A] ‘confessional stipulation’ is a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount ‘practically’ to a judicial confession when, for all facts and propose, it constitutes a *de facto* plea of guilty, *i.e.*, it is the equivalent of entering a guilty plea to the charge.”); MCM, *supra* note 6, app. 21, R. 811(c) (“[A] stipulation practically amounts to a confession when it amounts to a “*de facto*” plea of guilty, rather than simply one which makes out a *prima facie* case.”).

⁹⁷ MCM, *supra* note 6, R.C.M. 811(c) discussion.

⁹⁸ *United States v. Davis*, 50 M.J. 426, 430 (C.A.A.F. 1999).

⁹⁹ *Id.*; see MCM, *supra* note 6, R.C.M. 910(f).

¹⁰⁰ See, *e.g.*, *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

¹⁰¹ *Id.*; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); MCM, *supra* note 6, R.C.M. 910(h)(2).

¹⁰² MCM, *supra* note 6, R.C.M. 1001(c).

¹⁰³ *United States v. Young*, 43 M.J. 196, 197 (C.A.A.F. 1995).

¹⁰⁴ Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 14 (2004) (“Given the ongoing military operations in Iraq and Afghanistan, mental disorders are likely to remain an important health care concern among those who serving there.”); see *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (finding mental health issues enjoy special status in the military owing in part to the recognition that combat operations may “generate or aggravate” such conditions, especially post-traumatic stress disorder).

not reopen providence in order to address the issue or does so but is insufficient in the *Care*¹⁰⁵ inquiry,¹⁰⁶ on appeal the accused will assert that his pleas were not provident because they were not knowingly made.¹⁰⁷ The court has acknowledged the validity of this challenge stating:

We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any mental health issue on those pleas.¹⁰⁸

Against the underlying presumptions that the accused is sane¹⁰⁹ and the defense counsel is competent,¹¹⁰ when reasonably raised the military judge has a duty to inquire into the possibility of a mental health defense.¹¹¹ The existence of a defense, unless noted and disavowed, is inconsistent with a knowing and voluntary plea.¹¹² When, in the context of a guilty plea, a possible mental responsibility defense is raised, the military judge must inquire further.¹¹³ If, however, the evidence raises only a "mere possibility" of a defense further inquiry is not necessary.¹¹⁴ Where the line is drawn between "a possible" defense and "a mere possibility" of a defense is less than finite and depends on the facts of each case and the quality of evidence presented on the issue.¹¹⁵ Further inquiry is required when there is evidence that a mental disorder may have influenced the accused's pleas, which then raises concerns about the accused's mental capacity to plead, or raises questions about whether the accused was able to appreciate the nature and quality or wrongfulness of the acts.¹¹⁶ How much evidence is necessary to raise such inconsistency is a matter of debate.¹¹⁷

*United States v. Inabinette*¹¹⁸ represents the CAAF's latest attempt to clarify the issue.¹¹⁹ Inabinette challenged the providence of his guilty pleas alleging that a diagnosis of bipolar disorder raised a defense that was inconsistent with his plea.¹²⁰ The CAAF rejected the challenge finding that despite psychiatric testimony on behalf of the accused, the military judge's questions to the psychiatrist and the accused properly resolved any inconsistency between a potential mental

¹⁰⁵ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

¹⁰⁶ *United States v. Zachary*, 63 M.J. 438, 444 (C.A.A.F. 2006) ("This Court has held that a military judge has a duty under Article 45, UCMJ, to explain to the accused the defenses that an accused raises during a providence inquiry. . . . '[I]nconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected.' Where an accused is misinformed as to possible defenses, a guilty plea must be set aside.") (citations omitted).

¹⁰⁷ *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008); *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005).

¹⁰⁸ *Harris*, 61 M.J. at 398.

¹⁰⁹ MCM, *supra* note 6, R.C.M. 916(k)(3)(A).

¹¹⁰ *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (competence of counsel presumed).

¹¹¹ *United States v. Phillippe*, 63 M.J. 307, 310–11 (C.A.A.F. 2006) ("[W]hen, either during the plea inquiry or thereafter, and in the absence of prior disavowals . . . circumstances raise a possible defense, a military judge has a duty to inquire further to resolve the apparent inconsistency.").

¹¹² *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

¹¹³ *Id.*

¹¹⁴ *United States v. Glenn*, 66 M.J. 64, 66 (C.A.A.F. 2008); *United States v. Prater*, 32 M.J. 433, 436–37 (C.M.A. 1991).

¹¹⁵ *Shaw*, 64 M.J. at 464 ("Whether further inquiry [by the military judge] is required as a matter of law is a contextual determination."). Compare *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005) (conflicting evidence of mental health professionals concerning the accused's mental state gave rise to finding that the accused who did not know that he suffered from a mental disease or defect could not render an informed waiver of constitutional protection necessary for a provident guilty plea), with *Glenn*, 66 M.J. at 66 (finding accused sworn statement and the assessment of a social worker regarding the accused possible mental disorders—cyclothymic disorder—raised only a "mere possibility"), and *Shaw*, 64 M.J. at 462 (unsworn testimony of accused during sentencing that he was assaulted and beaten with a lead pipe leading to a coma, skull fractures, bruising and bleeding of the brain, deafness in one ear, blindness in one eye with a diagnosis of "bi-polar" syndrome amounted to only a "mere possibility" of a defense that did not warrant further inquiry by the military judge).

¹¹⁶ *Shaw*, 64 M.J. at 462–64.

¹¹⁷ *Id.* at 464 (Effron, J., dissenting) (contrary to the majority's opinion, finding the unsworn statement of the accused raising bi-polar disorder triggered the military judge's responsibility to inquire into the matter in order to resolve the inconsistency, since the inconsistency need not rise to the level of a complete defense, only a possible defense).

¹¹⁸ 66 M.J. 320 (C.A.A.F. 2008).

¹¹⁹ *Id.* at 322 (applying a de novo standard to review to determine whether the record raised a mere possibility of a defense or a possible defense, i.e., whether the facts on the record triggered the military judge's duty to make further inquiries).

¹²⁰ *Id.* at 321.

responsibility defense and the guilty pleas.¹²¹ This questioning was done “against the backdrop of consistent R.C.M. 706 board findings [that the accused was able to appreciate the nature and wrongfulness of his behavior].”¹²² A reading of *Inabinette* in the context of the court’s comparison with two other cases involving bipolar disorder, *United States v. Harris*¹²³ and *United States v. Shaw*,¹²⁴ further illustrates the subjective approach the CAAF takes in distinguishing a mere possibility of a defense against a possible defense, which defines the military judge’s duty to make further clarifying inquiries.¹²⁵

Harris is instructive when attempting to determine what the military judge is required to do to reconcile inconsistencies between possible defenses and a guilty plea. *Harris* dealt with the inconsistency between an RCM 706¹²⁶ sanity board inquiry, done pre-trial and finding no mental disease or defect, and a post-trial psychiatric diagnosis, finding that the accused’s bipolar disorder rendered him unable to control his actions or appreciate the wrongfulness of his conduct.¹²⁷ The convening authority appropriately ordered a post-trial Article 39(a), UCMJ, hearing “to determine whether the accused’s pleas of guilty were provident and should have been accepted’ in light of [the post-trial] diagnosis.”¹²⁸ The military judge conducted a post-trial inquiry, questioning the doctors who authored the conflicting reports, and found that while the accused was suffering from bipolar disorder he was able to appreciate the wrongfulness of his actions and was competent to stand trial, therefore his pleas remained provident.¹²⁹ Thereafter, the convening authority ordered another RCM 706 sanity board inquiry, which found that the accused was suffering from a severe mental disease, bipolar disorder, at the time of the offenses but was able to appreciate the wrongfulness of his conduct.¹³⁰

Although *Harris* was largely a case involving the applicable standards for a new trial under Article 73, UCMJ, and RCM 1210,¹³¹ the court did address the providence of the accused’s pleas.¹³² The court found a substantial basis to question *Harris*’s pleas asserting that he could not make an informed plea without knowing that he suffered from a mental disease or defect and the military judge could not engage in an adequate plea inquiry without exploring the impact the mental disease had on the accused’s pleas.¹³³ Apparently, what the military judge failed to do, despite his post-trial hearings and findings, was ask the accused whether he still wished to plead guilty despite the possible mental responsibility defense.¹³⁴ *Harris* is both instructive and troubling for the same reason. The holding invites gamesmanship since defense counsel could have petitioned the convening authority for a rehearing¹³⁵ based upon the results of RCM 706 sanity boards and the psychiatric diagnosis, if he thought the accused had a viable mental responsibility defense. Instead, the defense chose to use the post-trial diagnosis as part of their request for clemency.¹³⁶ Thus, despite an intentional decision or, perhaps, negligence by the

¹²¹ *Id.* at 323.

¹²² *Id.*

¹²³ 61 M.J. 391 (C.A.A.F. 2005).

¹²⁴ 64 M.J. 460 (C.A.A.F. 2007).

¹²⁵ *Id.* at 464–65 (Effron, J., and Erdmann, J., dissenting).

Appellant’s assertion that he suffered from bipolar disorder raised an apparent inconsistency with respect to his plea, thereby triggering the military judge’s duty to conduct further inquiry.

....

A statement by the accused’s triggers the military judge’s responsibility . . . when it raises the possibility that a defense may apply. The accused’s statement need not assert a complete defense.

Id.

¹²⁶ MCM, *supra* note 6.

¹²⁷ *Harris*, 61 M.J. at 393.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 394.

¹³¹ MCM, *supra* note 6.

¹³² *Harris*, 61 M.J. at 398.

¹³³ *Id.*

¹³⁴ *Id.* at 398 n.13 (“He could have inquired whether Appellant still wished to plead guilty, now aware of the 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 Appellants pleas were provident.”).

¹³⁵ See MCM, *supra* note 6, R.C.M. 1107(e).

¹³⁶ *Id.* R.C.M. 1105.

defense counsel, not to petition for a rehearing, it is ultimately the command that will have to resolve the issue. While the court never addresses the defense counsel's obligations, *Harris* is instructive for trial counsels and staff judge advocates. When a mental health issue could have: (1) influenced the accused's pleas; (2) affected his capacity to plead; or, (3) rendered the accused unable to appreciate the nature and quality or wrongfulness of his acts,¹³⁷ trial counsels and staff judge advocates have a responsibility to ensure that any inconsistencies between possible defenses and the guilty pleas are resolved on the record and that the guilty pleas remain knowing and voluntary.

In *Shaw*, the CAAF confronted the issue of whether a mental responsibility defense was raised during Shaw's unsworn statement when he said that he was diagnosed with "bipolar syndrome" after being beaten with a lead pipe that left him in a coma for several days.¹³⁸ Under these circumstances, the court found that the military judge did not have a duty to inquire further into the matter because the accused's statement alone only raised the "'mere possibility' of a defense."¹³⁹ Reading *Inabinette*, where the military judge's duty to inquire into a possible defense was apparently triggered by testimony of the forensic psychiatrist, with *Harris* and *Shaw*, one would draw the conclusion that a "possible defense" is triggered only when evidence beyond the accused's statement raises the issue.¹⁴⁰ This, of course, is not true. Courts have held that evidence beyond the accused's statements may not lend sufficient weight beyond a mere possibility of a defense,¹⁴¹ while others have found that the accused's statements alone trigger further inquiry.¹⁴² Thus *Inabinette* adds nothing new to the analysis except to recognize that the subtle distinction between a possible defense and a mere possibility of a defense remains case specific and incorporates both evidence introduced at trial and matters raised post-trial. Due to this uncertainty, both trial counsels and staff judge advocates should be vigilant when confronted with a possible mental health defense.

Lessons to be Learned: Whether the appellate court will view, in the context of a guilty plea, a reference to a mental or emotional ailment as raising a possible defense or as a mere possibility of a defense is subject to uncertainty. What is certain is that an appellate issue will exist if the military judge does not: (1) address the matter by "clearly and concisely explain[ing] the elements of the defense in addition to securing a factual basis to assure that the defense is not available";¹⁴³ and, (2) ascertain that both the accused and his counsel have explored the possibility of such defense and agree that it does not exist,¹⁴⁴ thus disclaiming the issue. This is especially true since during appellate review since, "to determine whether 'the providence inquiry provides facts inconsistent with the guilty plea, [the court will] take the accused's version of the facts 'at face value.'"¹⁴⁵ As a prophylactic measure, trial counsel should treat all mental health related concerns as raising a possible defense. Counsel must ensure that the military judge makes a factual record that resolves any ambiguity concerning possible defenses.¹⁴⁶ During a guilty plea, it is not unusual for the accused to attempt to minimize or rationalize his guilt. This element of humanness is recognized by the court.¹⁴⁷ Despite these attempts, the plea will be provident provided the military judge makes a factual record not only satisfying the elements of the offenses to which the accused pleads but also the factual elements that negate possible defenses, with appropriate disavowals from the accused and counsel.¹⁴⁸ Furthermore, beyond the availability of a viable mental health defense, the record should clearly resolve the *Harris/Shaw* question: what effect, if

¹³⁷ *United States v. Shaw*, 64 M.J. 460, 462-63 (C.A.A.F. 2007).

¹³⁸ *Id.* at 461.

¹³⁹ *Id.* at 464.

¹⁴⁰ *United States v. Inabinette*, 66 M.J. 320, 323 (C.A.A.F. 2008) (Conceding that the accused raised the issue of bipolar disorder after "suffering a severe brain injury," Shaw did not "offer any further evidence of his bipolar condition, nor did he assert that his condition implicated his mental responsibility for his offense.") (citations omitted); *Shaw*, 64 M.J. at 462 ("[U]nlike . . . *United States v. Harris*, . . . there was no factual record developed during or after the trial substantiating Appellant's statement or indicating whether and how bipolar disorder may have influenced his plea.").

¹⁴¹ *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (during sentencing, accused's sworn testimony concerning diagnosed personality disorder, testimony by a forensic counselor that a doctor had diagnosed accused with cyclothymic disorder, and testimony of the accused's sister concerning a family history of bipolar disorder, did not raise any inconsistency with the accused's guilty plea that triggered military judge's duty to reopen providence).

¹⁴² *United States v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006) (in a guilty plea to unauthorized absence, the accused's claims during sentencing that he attempted to return to military control earlier than the termination date plead to triggered military judge's duty to reopen providence and resolve inconsistency in guilty plea for unauthorized absence).

¹⁴³ *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976).

¹⁴⁴ MCM, *supra* note 6, R.C.M. 916(k)(3)(B) (military judge may direct an inquiry into the mental status of the accused under RCM 706).

¹⁴⁵ *United States v. Heitkamp*, 65 M.J. 861, 863 (A. Ct. Crim. App. 2007) (citations omitted).

¹⁴⁶ *Phillippe*, 63 M.J. at 310.

¹⁴⁷ *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J., concurring) ("One aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is 'inconsistent with the plea,' more often than not it is an effort by the accused to justify his misbehavior.").

¹⁴⁸ *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

any, does a mental health issue have on the accused's decision¹⁴⁹ or capacity to enter guilty pleas¹⁵⁰ and the knowing and voluntary nature of the plea?¹⁵¹

Voir Dire

Implied Bias

An area of recent frustration, for the court as well as appellate counsel, is the failure of military judges to address the issue of implied bias when confronted with a challenge for cause by the defense counsel. Pursuant to RCM 912(f)(1)(N), "A member shall be excused for cause whenever it appears that the member . . . Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."¹⁵² This provision for challenge encompasses both actual and implied bias.¹⁵³

Actual bias is a firmly held belief that will not yield to the military judge's instruction or the evidence presented at trial.¹⁵⁴ In reviewing a military judge's decision to deny a defense challenge on actual bias grounds, the appellate court affords the military judge broad discretion and will accept the judge's findings concerning the demeanor and sincerity of the member's disclaimers of bias.¹⁵⁵

Implied bias, however, is governed by a different standard. Implied bias is subject to an objective test that requires the court to view the circumstance through the eyes of the public in order to determine whether there would be substantial doubt as to the fairness or impartiality of the proceedings given the member's presence on the panel.¹⁵⁶ The amount of deference given a military judge's decision under an implied bias analysis depends on whether the facts present a "close" case and whether the military judge applied the three part test expressed in *United States v. Clay*: (1) whether the military judge recognized, on the record, the existence of implied bias concern; (2) whether he applied the court's mandate that instructs the military judge to grant defense challenges liberally (the liberal grant mandate); and, (3) whether the military judge articulated the facts relied upon that negated the appearance of implied bias.¹⁵⁷ A member's affirmation of impartiality and the military judge's finding that such declarations are sincere, unlike under an actual bias analysis, carry little weight.¹⁵⁸

Where the military judge fails to address all three elements on the record, the court will review the matter with less deference than if he had applied these elements to the challenge.¹⁵⁹ If the court finds the military judge abused his discretion, and the defense preserved the issue on appeal, it is likely the case will be overturned.

When a case is "close" in order to invoke the *Clay* factors is a matter of debate.¹⁶⁰ When the facts presented amount to a "close case" it is clear that the application of the *Clay* factors is required to avoid overturning the case on appeal. When a

¹⁴⁹ *United States v. Shaw*, 64 M.J. 460, 462-63 (C.A.A.F. 2007).

¹⁵⁰ *Id.*

¹⁵¹ *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005).

¹⁵² MCM, *supra* note 6, R.C.M. 912(f)(1), (f)(1)(N).

¹⁵³ *See id.* R.C.M., 912(f) discussion.

¹⁵⁴ *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

¹⁵⁵ *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

¹⁵⁶ *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008); *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000).

¹⁵⁷ *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

¹⁵⁸ *United States v. Strand*, 59 M.J. 455, 460 (C.A.A.F. 2004) ("[D]isclaimers of bias, . . . are not dispositive with regard to implied bias Nonetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias.") (citing *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1977)).

¹⁵⁹ *Clay*, 64 M.J. at 274.

¹⁶⁰ *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008) (dispute among the justices as to what constitutes a close case when applying the implied bias standard); *see United States v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007).

case is not close, the *Clay* factors are less relevant.¹⁶¹ The court, however, does not provide any specific guidance on the issue. Rather, *Clay* appears to invite a prophylactic approach to the issue.¹⁶²

Lessons to be Learned. Until the court provides definitive guidance,¹⁶³ trial counsel should ensure that when a defense's challenge for cause is denied, the military judge applies the *Clay* analysis. Specifically, the military judge should recognize his duty to address the challenge under the implied bias standard and the court's liberal grant mandate. The military judge should state on the record what facts, other than the member's assurances of impartiality and the credibility of such assertions, he relied upon it determining that a member of the public, who is familiar with military justice matters, would not substantially doubt the fairness or impartiality of the court-martial given the members' presence on the panel.

Hypothetical Questions

A relatively new area, but one that will provide some level of appellate review now that the court has addressed the matter, is the propriety of hypothetical questions during voir dire.¹⁶⁴

Hypothetical questions, while not per se impermissible, are improper if they present the member with case-specific facts and seek to commit the member to a particular verdict based upon those facts or to commit the member to resolving certain "aspects of the case in a specific way."¹⁶⁵ In *United States v. Nieto*, the court found that such questions by the trial counsel did not amount to plain error in absence of an objection by trial defense counsel, given that the court had not previously provided guidance on the issue.¹⁶⁶ Nieto was charged with wrongful use of cocaine, in violation of Article 112a, UCMJ.¹⁶⁷ The Government's case relied upon the results of a urinalysis, which was the product of faulty urine collection process.¹⁶⁸ During individual voir dire, in an attempt to explore the effects the case-specific deviation would have on a member's decision, the trial counsel designed hypothetical questions that incorporated the case-specific collection error, e.g., "And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle"¹⁶⁹ The intent of the questions was to ascertain whether the member would convict despite the collection error. While not holding that such "commitment" questions were per se impermissible, it is clear from the court's analysis that they are "disfavored" and, in subsequent cases, likely to be error on appeal.¹⁷⁰

Lessons to be Learned: A question is appropriate if it furthers the stated purpose of voir dire; i.e., the opportunity to "obtain information for the intelligent exercise of challenges"¹⁷¹ and a "tool" used to preserve the right to an impartial trial.¹⁷² Questions may not to be used as a means of arguing the case¹⁷³ or gaining some tactical advantage at trial. Provided counsel

¹⁶¹ *Id.*; *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002) (finding no abuse of discretion in denying accused's challenge despite absence on the record of the military judge's consideration of the liberal grant mandate).

¹⁶² *Townsend*, 65 M.J. at 467 (Baker, J., *dubitante*) ("Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?").

¹⁶³ The CAAF's application of the implied bias analysis is inconsistent. Compare *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008) (in a male-on-male forcible sodomy and indecent assault case, finding no implied bias when member expressed strong moral and religious objections to homosexuality and pornography), with *Clay*, 64 M.J. at 278 (in a rape and indecent assault case, finding implied bias when a member expressed a "moral conviction" regarding the crime of rape).

¹⁶⁴ *United States v. Nieto*, 66 M.J. 146 (C.A.A.F. 2008).

¹⁶⁵ *Id.*; *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000) ("[N]either side 'is entitled to a commitment' during *voir dire* about 'what they will ultimately do.'" (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)); *United States v. Rockwood*, 52 M.J. 98, 114 (C.A.A.F. 1999) (Gierke, J., concurring) (finding improper voir dire questions asking for a sentencing commitment).

¹⁶⁶ *Nieto*, 66 M.J. 146.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 148.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 150 (Stucky, J., concurring).

¹⁷¹ MCM, *supra* note 6, R.C.M. 912(d) discussion.

¹⁷² *United States v. Belflower*, 50 M.J. 306, 308-09 (C.A.A.F. 1999) (citing *Morgan v. Ill.*, 504 U.S. 719 (1992)); *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996).

¹⁷³ MCM, *supra* note 6, R.C.M. 912(d) discussion.

can provide a nexus between his voir dire question and the proper purpose of voir dire (determining whether grounds for challenge exist under RCM 912 or exposing a member's bias or prejudice)¹⁷⁴ the question should be allowed. Trial counsel should avoid hypothetical questions that seek to commit a member to a particular verdict or sentence or to resolve a disputed factual matter in the case.

Argument

Another fertile ground for appeal arises from counsel's improper argument. Three of the most frequent grounds for challenge on appeal are arguments alleged to inflame the passions and prejudices of the members; those that play upon the sheer number of charges to infer guilt; i.e., spillover, and those that comment on the accused's exercise of a constitutional right.¹⁷⁵

Inflaming the Passions and Bias of the Members

An argument designed to unduly inflame the passions or prejudices of members or divert the members from their duty to decide the case on the evidence presented at trial is improper.¹⁷⁶ For example, it would be improper to compare the accused to a known terrorist, third-world dictator, or mass murderer.¹⁷⁷ Counsel should also carefully review the propriety of drawing analogies during argument, especially if the analogy attempts to draw some relevance between the accused's offenses and offenses committed by others, especially those in the public eye.¹⁷⁸

Defining exactly where an argument crosses over the line of propriety and inflames passions or prejudices is often difficult to establish¹⁷⁹ and depends upon the context in which the comments were made.¹⁸⁰ A common error is counsel's arguments that rely on "irrelevant matters, such as personal opinions and facts not in evidence."¹⁸¹ Improper opinions injected into counsel's argument include the counsel's personal opinions concerning the truth or falsity of testimony or evidence,¹⁸² the accused's guilt or character,¹⁸³ or the character or style of the defense counsel.¹⁸⁴ Note that the impropriety stems from counsel's personal opinions and not from the state of the evidence as presented by the Government or the Government's theory of the case. Improper personal opinions also arise when counsel vouch for the credibility or veracity of Government witnesses or evidence,¹⁸⁵ or engage in personal attacks against the accused.¹⁸⁶

¹⁷⁴ See *Jefferson*, 44 M.J. at 318 (implying voir dire questions designed to develop rapport with members, indoctrinate members to the facts and law, and provide counsel with a basis for exercising peremptory challenges is proper) (citing *Morgan*, 504 U.S. at 729).

¹⁷⁵ See MCM, *supra* note 6, R.C.M. 919(b) discussion (listing examples of improper argument).

¹⁷⁶ *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).

¹⁷⁷ *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007) (references to Hitler, Saddam Hussein, and Osama bin Laden, during sentencing argument are improper but did not amount to plain error); *United States v. Nelson*, 1 M.J. 235, 237 (C.M.A. 1975) (comparing defense witness' tactics with those of Hitler is an improper argument).

¹⁷⁸ *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (argument making the analogy between adultery and heroin use improper); *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) (referencing celebrities is not per se improper, especially if it involves matters within common knowledge and not designed to inflame passions, yet comparisons by trial counsel during argument to cases involving Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry, and Robert Downey Jr. improperly introduced inflammatory facts not in evidence into accused's court-martial); *Nelson*, 1 M.J. at 238 ("It is also improper to associate the accused with other offensive conduct or persons, without justification of evidence in the record.") (citations omitted).

¹⁷⁹ See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, Standard 3-5.8, Argument to the Jury (1993); *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977) (Fletcher, J., concurring).

¹⁸⁰ *United States v. Young*, 470 U.S. 1, 16 (1985) (requiring a contextual analysis of counsel's comments); *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (members are asked to make their decision based upon an unemotional application of the facts to proper sentencing principles, not on "blind outrage and visceral anguish.") (citations omitted); *Clifton*, 15 M.J. at 30 (calling accused a "lair" is "a dangerous practice").

¹⁸¹ *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (citation omitted).

¹⁸² *Fletcher*, 62 M.J. 175.

¹⁸³ *Id.* at 181 (citing *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981)); *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003) ("almost a traitor" during sentencing argument potentially inflammatory).

¹⁸⁴ *Fletcher*, 62 M.J. at 181.

¹⁸⁵ *Id.* at 180 (citing *Young*, 470 U.S. 1).

¹⁸⁶ *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983); *United States v. Knickerbocker*, 2 M.J. 128, 129-30 (C.M.A. 1977).

During argument counsel should not go beyond the facts introduced at trial, with the exception of “contemporary history or matters of common knowledge within the community.”¹⁸⁷ “Going beyond” includes attempts to draw comparisons or analogies to other cases.¹⁸⁸ Error also occurs when counsel invokes the “Golden Rule,” asking the members to “place themselves in the shoes of the victim.”¹⁸⁹ What is permissible is to invite the members to consider the circumstances of the victim during the crime, imagining the victim’s pain, fear, anguish or suffering.¹⁹⁰ What is improper is to ask the members to place themselves in the victim’s place.¹⁹¹ Counsel must be aware of the distinction and carefully walk that fine line in order to avoid creating appellate issues and jeopardizing a case on appeal.

One of the more troubling aspects of improper argument is the use, during argument, of “uncharged misconduct” evidence introduced during trial under Military Rule of Evidence (MRE) 404(b), 413, or 414. Under MRE 404(b),¹⁹² counsel cannot use the uncharged misconduct evidence to argue propensity.¹⁹³ Provided counsel limit the use of the “other crimes, wrongs, or acts,”¹⁹⁴ to the purpose for which the evidence was admitted, and appropriate instructions are given to the members, there should be no issue on appeal.¹⁹⁵

When the charge involves sexual assault or child molestation as defined by MRE 413 or 414,¹⁹⁶ the risk of raising an appellate issue is greater. This is because the prior uncharged acts of sexual assault or child molestation are admissible and can be used “for its bearing on any matter to which it is relevant,”¹⁹⁷ including that which would be barred by MRE 404(b), i.e., to prove a propensity to commit the charged offenses.¹⁹⁸ The caveat is that while the members may use the “uncharged” acts as bearing on the accused’s propensity to commit the charged offense, they may not convict the accused of the charged offenses solely because they believe he committed the uncharged acts or because they believe he has a propensity to commit such acts.¹⁹⁹ This fine distinction remains a trap for the unwary trial counsel during the fervor of argument. The burden of establishing each element of the charged offense rests with the Government. The Government may not relieve itself of that burden merely because the members believe the accused has a propensity to commit such offenses.²⁰⁰ This means the trial counsel must walk a fine line when using the uncharged acts of sexual assault or child molestation during argument.²⁰¹

In *United States v. Schroder*, the court found that the trial counsel’s argument asking for justice for a victim of the uncharged misconduct along with that for the victims of the charged offenses was error.²⁰² “The MRE 414 safeguards²⁰³ could be undermined if trial counsel’s comments were permitted to range outside the realm of legally ‘relevant matters’ and express a sense of outrage and injustice for the victims of the uncharged misconduct.”²⁰⁴ In other words the trial counsel

¹⁸⁷ *Fletcher*, 62 M.J. at 183 (providing a list of examples of matters within the common knowledge of the community).

¹⁸⁸ *Clifton*, 15 M.J. at 29–30 (drawing such comparisons violates the precept that counsel’s argument is not evidence and that the accused may only be convicted on evidence introduced at his court-martial).

¹⁸⁹ *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2007) (finding “golden rule” argument improper because it “encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence”) (citations omitted).

¹⁹⁰ *Id.* at 238.

¹⁹¹ *Id.*; *United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976) (finding improper trial counsel’s argument asking members to place themselves in the position of the victim’s husband who was held down while the accused and others raped the victim).

¹⁹² MCM, *supra* note 6, MIL. R. EVID. 404, 413, 414.

¹⁹³ *See United States v. Franklin*, 35 M.J. 311, 316 (C.M.A. 1992) (evidence of acts admitted under MRE 404(b) may not be used to prove criminal disposition or propensity).

¹⁹⁴ MCM, *supra* note 6, MIL. R. EVID. 404(b).

¹⁹⁵ *United States v. Levitt*, 35 M.J. 114, 119 (C.M.A. 1992) (setting forth the elements of a proper MRE 404(b) limiting instruction).

¹⁹⁶ MCM, *supra* note 6, MIL. R. EVID. 413, 414.

¹⁹⁷ *Id.*

¹⁹⁸ *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000).

¹⁹⁹ *United States v. Schroder*, 65 M.J. 49, 55 (C.A.A.F. 2007).

²⁰⁰ *Id.*

²⁰¹ *See United States v. Sentance*, No. 34693, 2004 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 7, 2004) (in a sexual assault case, military judge prohibited trial counsel from arguing that the accused had a propensity to commit sexual assault).

²⁰² *Schroder*, 65 M.J. at 58.

²⁰³ *Id.* at 52–56 (citing *Wright*, 53 M.J. at 482) (finding proper safeguards include special instructions on the use of the MRE 414 uncharged acts, proper threshold findings, and application of MRE 403 balancing factors specific to MRE 414 evidence).

²⁰⁴ *Id.* at 58.

could use the uncharged misconduct evidence as evidence of propensity as long as it was clear that the members could not bootstrap that evidence and convict the accused merely because they believed he committed the uncharged misconduct or because they believed he had a propensity to commit such offenses. Trial counsel's request to provide justice for the victim of the uncharged misconduct was unduly inflammatory and invited the members to convict on the charge offenses in order to punish the accused for the uncharged misconduct.²⁰⁵

Spillover

When separate offenses are charged together for a single trial there exists a danger that members will use the evidence of one offense "to infer a criminal disposition on the part of an accused in regard to other crime(s) charged."²⁰⁶ This may result in a verdict based upon the character of the accused rather than the proof at trial.²⁰⁷ This is commonly referred to as "spillover."²⁰⁸ In order to overcome the presumption of innocence, due process requires the prosecution prove each element of the charged offense beyond a reasonable doubt.²⁰⁹ To ensure the members understand and abide by the constitutional requirement, the standard spillover instruction is often given.²¹⁰

The risk of improper spillover is especially prevalent in courts-martial separately charging several similar offenses. The temptation during argument to link two or more similar offenses together is especially compelling, natural, and likely to lead to appellate relief.²¹¹

Lessons to be Learned: Trial counsel should structure his argument to ensure that the evidence for each offense is compartmentalized thus avoiding the spillover effect. When counsel takes steps to separate the presentation of evidence during trial and argument, and ensures the military judge instructs the members appropriately, it is unlikely that spillover will be an issue.²¹² Furthermore, if there is the potential for impermissible spillover, the trial counsel should request that the spillover matter be addressed during voir dire²¹³ and the spillover instruction be given at several appropriate times during the trial.²¹⁴

Infer Guilt-Based upon Accused's Exercise of Constitutional Rights

Any reference during argument that directly, indirectly, or by innuendo, comments on the accused's exercise of his constitutional rights is impermissible.²¹⁵ It is error for trial counsel to comment on the accused's failure to plead guilty;²¹⁶ the

²⁰⁵ *Id.*

²⁰⁶ *United States v. Myers*, 51 M.J. 570, 579 (N-M. Ct. Crim. App. 1999).

²⁰⁷ *Id.*

²⁰⁸ The "where there is smoke there is fire" analogy is used to describe the spillover effect. Thus, the quantity of evidence or number of charges is used to infer guilt regardless of whether the evidence is sufficient to satisfy the elements of each offense beyond a reasonable doubt. See *United States v. Ryan*, 2007 CCA LEXIS 111, at *10 (N-M. Ct. Crim. App. Mar. 29, 2007), *aff'd in part, rev'd in part*, 65 M.J. 328 (C.A.A.F. 2007). But see MCM, *supra* note 6, R.C.M. 601(e)(2) ("Ordinarily all know charges should be referred to a single court-martial.").

²⁰⁹ *Estelle v. McGuire*, 502 U.S. 62, 78 (1991); see *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999) (applying a three prong test to determine if a manifest injustice occurred to the detriment of the accused due to the effect of spillover).

²¹⁰ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHMARK 877 (15 Sept. 2002) (C2, 1 July 2003) ("Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.").

²¹¹ *Myers*, 51 M.J. at 581-52 ("[T]he Governments' cases regarding the separate offenses [of rape against two different victims] were weak When joined together, the temptation of the member to apply 'where there's smoke there must be fire' logic simply cannot be discounted or ignored. We additionally note that the prosecution could not resist the temptation to make the compelling 'similarity' argument to the members").

²¹² *United States v. Duncan*, 53 M.J. 494, 498 (C.A.A.F. 2000); *United States v. Hogan*, 20 M.J. 71, 73 (C.M.A. 1985) (finding curative spillover instructions would have substantially diminished any prejudicial effect on the trial).

²¹³ *United States v. Will*, No. 9802134, 2002 CCA LEXIS 218, at *20 (N-M. Ct. Crim. App. Sept. 27, 2002) ("A number of measures may serve to limit impermissible spillover. Prospective members may be questioned during voir dire whether they can keep the evidence separate.").

²¹⁴ *United States v. Sentance*, No. 34693, 2004 CCA LEXIS 27, at *9 (A.F. Ct. Crim. App. Jan. 7, 2004) (finding defense requested spillover instruction given during voir dire, after an evening recess, and during instructions on finding was a proper prophylactic measure); *Will*, No. 9802134, 2002 CCA LEXIS, at *20.

²¹⁵ *United States v. Moran*, 65 M.J. 178, 186 (C.A.A.F. 2007); *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990).

²¹⁶ *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992).

exercise of his right to remain silent;²¹⁷ the refusal to consent to a consent search;²¹⁸ or, the request to speak with an attorney.²¹⁹ It is also improper to ask the members to infer guilt or draw an adverse inference from the accused's constitutional exercise of his right to challenge the Government's case or from his reliance on the reasonable doubt standard.²²⁰ Finally, it is improper to use the accused's failure to produce witnesses or evidence on his behalf as evidence against him.²²¹ These caveats apply during argument on findings as well as sentencing.²²²

A common error occurs when trial counsel attempts to shift the burden of proof or otherwise refers to the lack of evidence that only could come from the accused, thus commenting indirectly on the accused's right to remain silent. In *United States v. Carter*, the court found the trial counsel's repeated reference to the Government's "uncontroverted" and "uncontradicted" evidence to be error when the defense presented no evidence during the case-in-chief.²²³ While it is proper for the Government to comment on the defense's failure to refute the Government's case or to support claims made by the defense, "a constitutional violation occurs [] if either the defendant alone had the information to contradict the Government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as comment on the failure of the accused to testify."²²⁴ Airman First Class Carter was charged, among other things, with indecent assault.²²⁵ The Government's case consisted of one witness, the victim of the assault, and the defense presented no witnesses or evidence during their case-in-chief.²²⁶ Since the only witnesses to the contested offense were the accused and the victim, the trial counsel's repeated comment that the Government's evidence was "uncontroverted" and "uncontested" was an impermissible reference to the accused's right to remain silent and an impermissible attempt to shift the burden of proof by inferring that the accused had the obligation to produce evidence to contradict the Government's case.²²⁷ In *Carter* the court analyzed the trial counsel's argument against the doctrine of "invited reply,"²²⁸ which would allow the prosecution to rebut matters otherwise prohibited when first introduced by the defense.²²⁹ The trial counsel's comments were not specifically tailored to address matters first introduced by the defense either during their case-in-chief or as a result of cross-examination. Without a carefully crafted nexus that ties the substance of trial counsel's argument to matters introduced by the defense, any reference that appears to shift the burden of proof or inferentially comment on the accused's right to testify will be challenged on appeal.

A careful examination of the evidence at trial may allow trial counsel to comment on that which would otherwise be prohibited. Within the context of the evidence presented and the issues raised,²³⁰ a matter interjected into the trial by the

²¹⁷ *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993).

²¹⁸ *Moran*, 65 M.J. at 186–87.

²¹⁹ *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001).

²²⁰ *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) ("What [trial counsel] in fact conveyed is clear: An innocent man has nothing to hide, no reason to exercise his rights; the fact that appellant sought refuge behind his rights suggests he was not innocent.").

²²¹ *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

²²² *United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975) (trial counsel's argument on sentencing that the members use the fact that the accused did not plead guilty as evidence in aggravation is an improper comment on the accused's right to be presumed innocent, plead not guilty, and have the Government prove his guilt with competent evidence beyond a reasonable doubt).

²²³ 61 M.J. 30, 32–33 (C.A.A.F. 2005).

²²⁴ *Id.* at 33 (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981) (citations omitted)); see *United States v. Saint John*, 48 C.M.R. 312 (C.M.A. 1974). Unless the contradiction could only have come from the accused, "there is 'considerable authority indication that a bare statement that the prosecution's evidence, or some designated part of it, is uncontradicted, does not per se involve an impermissible reference to the defendant's failure to testify.'" *Id.* (citation omitted).

²²⁵ The accused in *Carter* had pled guilty to several offenses unrelated to the contested charge of indecent assault. *Carter*, 61 M.J. at 31.

²²⁶ *Id.* at 31–32.

²²⁷ *Id.* at 33–34. But see *Lockett v. Ohio*, 438 U.S. 586 (1978) (prosecution's reference to the Government's evidence as uncontradicted was not error when made in response to the defense's statement before the jury that the defendant would be called as a witness and never was).

²²⁸ *Carter* refers to "invited reply" or "invited response" as a doctrine that would allow trial counsel to comment properly on matters otherwise improper because of the actions or remarks by the defense counsel. *Carter*, 61 M.J. at 33. However, in *United States v. Young*, 470 U.S. 1 (1985), the Court notes that the terms "invited response" or "invited reply" have evolved from the Court's original intent. Originally envisioned the "invited response" or "invited reply" doctrine was not intended to suggest judicial approval of a prosecutor's remarks or actions that were in response to remarks first made by the defense. Rather, the doctrine was a means to determine whether an otherwise improper response by the prosecution unfairly prejudiced the defendant. *Young*, 470 U.S. at 11–12.

²²⁹ *Carter*, 61 M.J. at 33–34.

²³⁰ *Id.* at 33 ("A prosecutorial comment must be examined in light of its context within the entire court-martial."); *Young*, 470 U.S. 1 (court must determine whether the prosecution's remarks, in context and taking into account the actions and remarks by the defense, unfairly prejudice the defendant).

defense would allow trial counsel rebuttal under the doctrine of “invited reply” or “invited response.”²³¹ Trial counsel should ensure that the comments are in response to proper evidence introduced at trial and the fair inferences that can be drawn therefrom.²³² In *United States v. Haney*, the court cautioned trial counsel to be careful when commenting on the accused’s invocation of his rights under Article 31, UCMJ, even though it found that the counsel’s references were in response to the defense’s coerced confession theory, first introduced into the trial by the accused.²³³

Likewise, in *United States v. Gilley*, the court found no material prejudice under the doctrine of invited reply.²³⁴ The trial counsel’s comments referencing Gilley’s request for counsel and his refusal to sign a written confession were in response to the defense’s theme, first introduced by the defense counsel during opening statement, that the accused never read the confession and refused to sign it because law enforcement agents fabricated the statement.²³⁵ Again, the court is cautious about opening the rebuttal door too wide. It will closely scrutinize the text of the trial counsel’s argument to ensure that there is a direct nexus between the rebuttal comments and the facts raised by the defense.²³⁶ Even if the comments during argument are fair rebuttal, counsel must ensure not to draw too much attention to the invocation of constitutional rights since repetition may lead “the members to attach a significance to such invocation that went beyond fair rebuttal of appellant’s allegation.”²³⁷

One final note regarding common errors during argument: counsel must be careful about interjecting personal pronouns into the argument as this often gives rise to claims of improper vouching for the veracity of a witness, evidence, or status of the case.²³⁸ The court addressed this issue in *United States v. Fletcher*, offering counsel some acceptable terms to replace the personal pronouns, to include: “‘you are free to conclude,’ ‘you may perceive that,’ ‘it is submitted that,’ or ‘a conclusion on your part may be drawn.’”²³⁹ As awkward as these rote phrases are, counsel should modify them to fit one’s own style while avoiding personal pronouns.

Lessons to be Learned: Argument should be a well-reasoned, logical explanation of the Government’s theory of the case based upon the evidence introduced at trial and the inference that reasonably could be drawn from the facts. Trial counsel must remember that they represent the United States, thus they have a duty to ensure that justice is done and must “refrain from improper methods calculated to produce a wrongful conviction.”²⁴⁰ Trial counsel should suppress the impulse to reference personal opinions,²⁴¹ religious views,²⁴² or invoke the name of mass murders, evil dictators,²⁴³ or known terrorist no matter how clever and brilliant the analogy may seem at the time. The goal is not only “[t]o seek justice, not merely to convict,”²⁴⁴ but also preserve the finding and sentence on appeal.

²³¹ *United States v. Robinson*, 485 U.S. 25, 32–33 (1988) (“fair response” doctrine); see *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007) (finding proper trial counsel’s argument concerning lack of rehabilitative potential, based upon the testimony of a defense expert, however, cautioning counsel not to tie such remarks to the accused’s failure to testify or admit guilt); *United States v. Nelson*, 1 M.J. 235, 237 (C.M.A. 1975) (finding proper trial counsel’s comment during argument on the failure of the accused to mention an alibi defense during his testimony at the Article 32, UCMJ hearing); see also *Walder v. United States*, 347 U.S. 62, 65 (1954) (“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.”).

²³² *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (“This Court has consistently cautioned counsel to ‘limit’ arguments on findings or sentencing ‘to evidence in the record and to such fair inferences as may be drawn therefrom.’”).

²³³ *United States v. Haney*, 64 M.J. 101, 105–06 (C.A.A.F. 2006).

²³⁴ *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001).

²³⁵ *Id.* at 121–22.

²³⁶ *Id.* at 123.

²³⁷ *Id.*

²³⁸ *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (“Improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed. Prohibited language includes ‘I think it is clear,’ ‘I’m telling you,’ and ‘I have no doubt.’”) (internal citations omitted).

²³⁹ *Id.*

²⁴⁰ *Id.* at 179 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

²⁴¹ *Id.* at 179–81.

²⁴² *Bains v. Cambra*, 204 F.3d 964, 974–75 (9th Cir. 2000).

²⁴³ *But see United States v. Wernecke*, 138 F.2d 561 (7th Cir. 1943) (finding prosecution’s reference to Hitler during argument proper given the defendant’s affiliation with various National Socialist activities).

²⁴⁴ *Fletcher*, 62 M.J. at 182 (citations omitted).

If the defense's objection to counsel's argument is sustained or the military judge interjects sua sponte, trial counsel should ensure that corrective instructions are given immediately and then again during the instruction phase of trial. In order to cure any potential taint, curative instructions must focus on the impropriety and be given at a time when the curative instruction would have its intended effect.²⁴⁵ Trial counsel should not repeat the same error thus negating the curative nature of the instruction.²⁴⁶

If the trial counsel does comment, under the "invited response" doctrine, two essential factors should be present: (1) counsel should ensure that the record contains clear and unmistakable defense evidence or comment that would justify the invited reply doctrine or, in a Article 39(a), UCMJ, session, place on the record exactly what defense claim or evidence the comments seek to rebut; and, (2) trial counsel should ensure that the military judge gives the proper limiting instructions, subject to the objection of the defense,²⁴⁷ in order to avoid any allegation that the members placed improper or undue significance to the remarks.²⁴⁸

Conclusion

While not a complete list of common appellate issues, the matters identified in this article represent frequent and easily avoided appellate issues. Trial counsel must understand that the case is not complete when the military judge announces final adjournment.²⁴⁹ Rather, it is merely the end of one process and the beginning of another that includes post-trial processing and appellate review. With that in mind, competent counsel protect the record to ensure that the case is as "bulletproof" as possible for appeal.

²⁴⁵ *Id.* at 185 (curative instructions at an early point in the proceeding may dispel taint); *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977).

²⁴⁶ *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005).

²⁴⁷ *Lakeside v. Or.*, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting) (commenting on the adverse effects of giving a cautionary instruction regarding the accused right to remain silent over the defense's objection).

²⁴⁸ *Id.* at 340 ("It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. . . . We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments."); *United States v. Charette*, 15 M.J. 197, 201 (C.M.A. 1983) (no error if military judge fails to provide a cautionary instruction regarding the accused's right to remain silent on the express request by defense counsel not to give such instruction).

²⁴⁹ MCM, *supra* note 6, R.C.M. 1011.