USALSA Report
U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: A Military Judge's Perspective on Court-Martial Providency

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Introduction

After almost thirty years in the shoes of the criminal defense lawyer,[2] I am intimately familiar with trial defense counsel's challenge at a guilty plea—how to persuade an anxious, often barely post-adolescent, accused in the biggest trouble of his life to fess up and talk candidly with a judicial officer of intimidating rank, and to publicly admit the truth of what that Soldier did. But getting that emotionally conflicted Soldier to plead guilty is *not* the job of the military judge. Assuming that a guilty plea is in the accused's best interest, that job belongs to the trial defense counsel and, to a lesser but still important extent, to the government trial counsel to "make it happen." Nonetheless, before discussing the responsibilities of the trial lawyers, it is useful to reflect briefly on the role of the military judge at the guilty plea and his responsibilities both to the rights of the accused and to the military justice system that eventually reviews the record of what transpired.

The Legal Framework for Guilty Pleas—Getting All the Parties on the Same Page

The requirements of a provident guilty plea are a creature of both the *Manual for Courts-Martial* and the United States Constitution. Rule for Courts-Martial (RCM) 910[3] imposes the following: that the military judge address the accused personally and determine that the accused understands (1) the nature of the charges to which the accused is pleading guilty; (2) the range of punishment provided by law; (3) the accused's right to representation by qualified counsel; (4) the accused's right to plead not guilty and be tried by a court-martial at which he enjoys the right of confrontation and the right against self-incrimination; (5) that, if the accused pleads guilty, he waives those enumerated rights; and, (6) that, upon pleading guilty, the military judge will question the accused about the offense under oath—answers that, if made under oath on the record in the presence of counsel, may be used against him at sentencing.[4]

The military judge "shall not" accept a guilty plea unless, after addressing the accused personally, the military judge determines that the plea is voluntary. This inquiry encompasses concerns about whether the plea is the product of force or of threats or promises other than a permissible pretrial agreement (PTA) under RCM 705.[5] Other than any sentence limitation term (the "quantum"), the military judge must discuss the entirety of the agreement with the accused on the record.[6] The

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[3] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 910, app. 21, Analysis of Rules for Courts-Martial (2005) [hereinafter MCM]. Rule for Court-Martial 910 generally tracks the guilty plea format of Federal Rule of Criminal Procedure (FRCP) 11. Rule for Court-Martial 910(c), (d), and (e) codify the requirements of *United States v. Care*, 40 C.M.R. 247 (1969) discussed *infra* at n.8.

[4] MCM, *supra* note 3, R.C.M. 910(c) (1-5).

[5] *Id.* R.C.M. 910(d); Boykin v. Alabama, 395 U.S. 238 (1969) (holding that the Due Process Clause of 14th Amendment requires knowing waivers of constitutional rights at a guilty plea to be reflected on the record).

[6] MCM, *supra* note 3, R.C.M. 910(f)(3); United States v. Green, 1 M.J. 453 (C.M.A. 1976) (holding that the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

military judge is obligated to perform this inquiry to ensure that the accused understands the agreement and that both the government and the defense agree as to the import of its terms.[7]

There must be a factual basis for the plea in addition to the accused's mere admission of guilt.[8] As mentioned earlier, the military judge must directly address and elicit from the accused under oath, his understanding of what he did and how that conduct violated the law.[9]

Defense Preparation for Providency

There is more to preparing an accused for his guilty plea than showing him where in the script he should say, "Yes, Your Honor." The Soldier needs to be ready to have a full discussion with the military judge on any aspect of the providency proceeding. Indeed, the appellate courts that grade the trial court's work soundly condemn reliance by the military judge on leading or legally conclusive questions, especially as they apply to the elements of the offense and the interrelated factual basis for the plea.[10] In other words, the Soldier needs to be prepared for some two-sided conversation about his understanding of the rights he is surrendering and his understanding of the elements of the crimes for which he is pleading guilty. In addition, the Soldier must be able to cogently and consistently explain what he did and why it was wrongful.[11]

"Rehearsal" may strike some as too explicit a term for the necessary preparation, because it suggests rote responses and lacks spontaneity. However, the defense counsel is responsible for making sure that *before* he enters the courtroom, the accused is prepared to discuss his guilty plea with the military judge. If the accused is not in confinement, then bring him to the courtroom on a slow day and walk him through the providency inquiry. Let him absorb a sense of the courtroom so that he will be less fearful of the surroundings. While the accused is doubtless not happy to talk with the judge, he needs to understand providency in order for his plea to be successful.[12] The full-fledged discussion is absolutely necessary in order that the military judge make the required findings to ultimately accept the plea.[13]

Government Cooperation with an Eye Toward Providency

Assuming the government has brought its prosecution in good faith that the accused is guilty, the government should be somewhat satisfied that it has nearly achieved its objective of a conviction without a contest. The government controls its side of the terms of the PTA, a role in drafting a stipulation of facts applicable to the plea, and the power to help clean up inconsistencies and minor errors in the charge sheet. Mindful that the accused is generally untrained in the law, writing the terms of the PTA and the stipulation briefly and in plain English rather than "legalese" will go a long way toward insuring that the accused actually understands these documents and their purposes. Keeping things simple and unambiguous makes it much more likely that the plea will survive appellate scrutiny.

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[7] MCM, *supra* note 3, R.C.M. 910(f)(4); *Green*, 1 M.J. 453.

[8] A big "foot stomp" here. This is the part of the providency inquiry that is not completely scripted in the *U.S. Department of the Army, Pamphlet 27-9*. Accordingly, it is the stage where, as we will discuss shortly, the plea may come apart either at trial or on appeal. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCH BOOK ch. 2, § II (15 Sept. 2002).

[9] MCM, *supra* note 3, R.C.M. 910(e); *see, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (mandating direct inquiry into accused's understanding of law in relation to facts under FRCP 11); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (prospectively adopting the reasoning in *McCarthy v. United States* and the voluntariness/waiver of rights requirements of *Boykin v. Alabama* in guilty pleas under the RCM).

[10] *E.g.*, United States v. Jordan, 57 M.J. 236 (2002) (finding that the accused's "yes" response to legally conclusive question whether his conduct was prejudicial or service discrediting failed to establish factual predicate). The obviously better question would have been, "Tell me how you think your conduct was prejudicial to good order and discipline or service discrediting?"

[11] The court has no knowledge of what happened and relies on the parties in court for the facts even if provided a stipulation of facts beforehand. Material inconsistencies are resolved by contested trials and not guilty pleas. Further, the parties should be careful that inconsistent facts do not arise during sentencing because this may reopen providency and compromise the plea. This is exactly what occurred in the recent effort by one of the Abu Ghraib defendants, Private First Class Lynndie England, to plead guilty, only to have the military judge declare a mistrial after her boyfriend, a co-defendant, testified on her behalf at sentencing that she was unaware of the wrongfulness of her conduct and was "just following orders." *Abu Ghraib Judge Declares Mistrial*, CNN.COM, May 4, 2005, http://www.cnn.com/2005/LAW/05/04/prisoner.abuse.england/index.html.

[12] I have occasionally reminded counsel in RCM 802 sessions that I have a law degree but not a degree in dentistry so I am reluctant to "pull teeth" to get through the plea.

[13] MCM, *supra* note 3, R.C.M. 910(g).

Conclusion

You can bring the accused to providency, but neither you nor the military judge can make him plead guilty. The accused must want to plead guilty and must be able to do so with a complete understanding of his rights, and the impact of his conduct on the mores of military society. The accused must know and appreciate the terms of any agreement with the convening authority that affected the decision to surrender his rights and plead guilty. Preparation of the accused takes time, patience, and a commitment from the defense counsel to the accused's education in the legal process. The government can assist this objective by keeping things simple and clear. The critical performance by the accused will be in the development of a factual basis in support of his plea of guilty and its interrelation to the elements of each offense. That will take place in the course of an unscripted conversation between the Soldier and the military judge. Preparing the accused to participate in this conversation will assure that his plea will be found and remain provident.