T H E A D V O C A T E

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THE GUILTY PLEA

The Pretrial Agreement

Guilty pleas comprise approximately 65% of all general courts-martial in the Army. Of these,almost 3/4 are negotiated pleas. Recently there has been considerable interest in the civilian guilty plea system; we can anticipate a similar reexamination of the military procedures. Some observations, therefore, might be in order.

The pretrial agreement, the bulwark of our guilty-plea system, is not recognized either by the Manual for Courts-Martial or the Uniform Code. Nevertheless, the Court of Military Appeals has recognized and approved its use, though not without reservation. In United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968), the Court held that the law officer should inquire into the terms of the agreement during the providency hearing, and implied that it should be made a part of the record. Moreover, the Court held there and in subsequent cases that agreements which required waivers of speedy trial or of other due process rights were contrary to public policy and were void.

Pretrial agreements began in 1953 at the behest of the Acting The Judge Advocate General. See CM 390869, Callahan, 22 CMR 443 (1956). At that time, the Army had a much higher percentage of not-guilty pleas than did civilian jurisdictions. Agreements helped to reduce the contested caseload.

The common agreement is between the accused and the convening authority, but there have been some agreements between the accused and the staff judge advocate in Vietnam. These are offers to plead guilty in return for a recommendation from the SJA. If the convening authority treats the agreement as binding upon him, no harm can be perceived from this form of agreement. However, such agreements should not be encouraged because they are not legally binding upon the convening authority. Even though the Court has held that a pretrial agreement is not an operative limitation on its divisible portions, United States v. Brice, 17 USCMA 336, 38 CMR 134 (1967), most pretrial agreements now provide expressly that the agreement will serve as such an operative limit. This seems desirable and avoids litigation of the issue on appeal.

The civilian guilty plea system was recently questioned by Chief Judge Bazelon of the D.C. Circuit Court of Appeals. In Scott v. United States, ___F.2d___(D.C. Cir. 13 Feb. 1968), the court criticized a lower court judge who imposed a stiffer sentence on the accused because he did not admit his guilt at trial. Judge Bazelon criticized any system which imposed heavier sentences, as a matter of policy, upon those who plead not guilty.

We know in the Army that on the average, sentences for guilty pleaders are lower than for not guilty pleaders. Whether this system would withstand a challenge such as that leveled in Scott is debatable. Some have gone so far as to observe that no guilty plea program could withstand review, Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.Chi.L.Rev. 50 (1968).

Problems will most certainly arise when, under the provisions of the Military Justice Act of 1968, military judges begin to impose sentences in cases tried solely before them. Should they see the pretrial agreement?

It may be that drastic reform in the pretrial agreement system is in order. It is a system which has not had enough in-depth study, but likewise one which will be difficult to replace. THE ADVOCATE solicits your comments.

The guilty plea as a waiver

Probably no aspect of the guilty plea is less understood than its effect as a waiver of procedural and other rights. Much of the confusion has been generated by United States v. Hamil, 15 USCMA 110, 35 CMR 82 (1964). There, the Court of Military Appeals held that denial of a motion to suppress the results of a search and pretrial statement was not reviewable where the accused pleaded guilty to a lesser included offense, thereby judicially admitting the facts controverted. The accused did not contest the voluntariness of his plea, and it appeared affirmatively on the record that the search was "not a factor in prompting the plea." Some have read this case to mean that a voluntary plea of guilty automatically waives appellate consideration of the denial of such a pretrial motion. CM 419134, Rosenfeld, (17 January 1969); CM 418896, Sullivan, ___CMR ___(23 October 1968).

In CM 419151, Yasutake, (27 January 1969), however, one Board of Review looked beyond the words of Hamil to its rationale. Hamil, the Board concluded, applies only where the accused would have pleaded guilty regardless of the outcome of his motion (certainly a rare case). The Board concluded that since there was no pretrial agreement, the guilty plea was entered only because the law officer ruled the way he did. The Board considered the merits of the motion on appeal, determined that the search involved was illegal, the evidence obtained thereby inadmissible, and dismissed the charge.

Counsel are encouraged to read these decisions before deciding whether to plead guilty after the denial of a motion to suppress. If tactical advantages can be gained by pleading guilty, counsel and the accused should make it as clear as possible on the record that the plea is being entered because of the law officer's ruling denying the motion, thus availing themselves of the protection of United States v. Bearchild, 17 USCMA 598, 38 CMR 396 (1968) (judicial confession induced by prosecution's use of unlawfully obtained confession is of no effect).

WARNING THE ACCUSED OF HIS ARTICLE 38(b) RIGHTS BEFORE TRIAL--THE DEFENSE COUNSEL'S DUTY

The Court of Military Appeals last month gave the military thirty days to comply with a new requirement to insure that accused are aware of their rights under Article 38(b), Uniform Code of Military Justice. In United States v. Donohew, No. 21,426, ___USCMA ___, ___CMR___(decided 7 March 1969), the Court ruled that the

record of each special or general court-martial convened after 7 April 1969 must contain the accused's personal response to direct questions incorporating each of the elements under Article 38(b) as well as his understanding of his rights thereunder.

Apparently the trial counsel has the obligation of insuring compliance with this decision at trial, but the trial defense counsel also has the obligation of advising his client of his rights to counsel under Article 38(b) as soon as the charges are referred to trial. See Paragraph 46d, Manual for Courts-Martial, United States, 1969. Thus, to assist defense counsel to fulfill their pretrial obligations, and to prevent claims that their assistance was ineffective, THE ADVOCATE presents a sample Article 38(b) form for the use of defense counsel in the field. This may be reproduced locally as needed. We suggest that during an out-of-court hearing, this form be offered as an appellate exhibit and attached to the record.

RIGHTS TO COUNSEL UNDER ARTICLE 38(b), UNIFORM CODE OF MILITARY JUSTICE

I am _____(name)_____, the accused in a case which has been referred to trial by _____ court-martial. I acknowledge that I have been informed by _____ that I have the following rights:

INITIALS

1. I have the right to be represented at trial by a civilian lawyer, if I hire and pay him or otherwise engage him to represent me. _____

2. I have the right to be represented at trial by a military lawyer free of charge; by my detailed defense counsel, or by a military lawyer of my own selection, if reasonably available. My detailed defense counsel will assist me in requesting the latter, if I desire. _____

3. If I desire, my detailed defense counsel may continue to act as associate counsel with my civilian lawyer or requested military lawyer. _____

_____
Signature of accused; date

I certify that on _____, _____ I have advised the above-named accused of the above-mentioned rights.

_____
Signature of detailed counsel; date

IF YOUR CLIENT DENIES MAKING A PRETRIAL STATEMENT, USE PARAGRAPH 140a(3) OF THE NEW MANUAL

Trial defense counsel should be aware of a little-noticed provision in the 1969 Manual which they can use to their advantage when the accused admits making a pretrial statement, but denies making the statement in exactly the form being offered against him, or when he denies making any statement at all.

Paragraph 140a(3) of the new Manual imposes a sua sponte obligation on the law officer to instruct the court that before it may consider the statement against the accused, it must find beyond a reasonable doubt that the accused in fact made the statement.

Moreover, the accused now has a right to testify and limit his testimony to the question whether or not he did in fact make the statement. He may not be cross-examined on any other issue in the case.

However, the Manual requires that before such an instruction will be required, there must be some evidence introduced in open session (presumably by the defense) raising the issue.

In most cases, unless a pretrial statement is written in the accused's own hand, it will have been transcribed from an oral interrogation by a CID investigator, and may or may not have been signed by the accused after transcription. If there is any question as to the wording of the statement, whether it is signed or unsigned, it would seem that the accused now has a right to contest this issue along with the standard warning issues, without jeopardizing the rest of his defense.

In such a case, the trial defense counsel should, during the out-of-court hearing, exercise his rights under Paragraph 140a(3):

(1) Inform the law officer that the accused desires to testify only on the issue of whether the statement was made, or made in the form being offered by the government.

(2) Insure that the accused limits his testimony to this issue. Evidence of the accused's educational and environmental background would seem relevant to determine whether the words in the statement are those of the accused.

(3) Inquire of the CID investigator the exact procedures he followed in transcribing the statement.

(4) Move to strike any portions of the statement being offered which were not made by the accused, or not made in that form. In appropriate cases a motion to suppress the entire statement would be in order.

(5) Request an appropriate instruction under Paragraph 140a(3). CAVEAT: In order to qualify for such an instruction, the issue must be raised again in open court.

There is one significant problem with this procedure which must be faced, but cannot be effectively cured under the present Manual. The court is instructed that it must disregard the entire statement unless it finds beyond a reasonable doubt that the accused made it, but this instruction comes after the statement has already been received in evidence. It would seem virtually impossible to "re-bag the cat" once the confession comes in. Ideally, the issue would be presented to the court as an interlocutory question of fact. But there is no such procedure known in the military.

Still in doubt is the standard to be applied by the law officer when ruling on admissibility if the accused denies making the statement. See United States v. Mewborn, 17 USCMA 431, 38 CMR 229 (1968). Discussion of this question will be reserved until a later issue. THE ADVOCATE solicits comments from trial defense counsel on their experience under new Paragraph 140a(3).

TAILORING THE SENTENCE WORKSHEET TO CREDIT PRETRIAL CONFINEMENT

Sentence worksheets, mentioned neither in the Manual nor in the Uniform Code, are nevertheless fast becoming recognized vehicles for the court to use in announcing its sentence. They are almost always attached to the record as an appellate exhibit, and are scrutinized on appeal for inconsistencies with the announced verdict.

The worksheet generally sets out all the permissible sentences in the forms recommended in Appendix 13 of the 1969 Manual. Defense counsel are offered an opportunity to examine the worksheets before they are handed to the court, and during an out-of-court hearing, are usually permitted to recommend tailoring.

There is at least one way a trial defense counsel can make the worksheet work for him, --he can recommend that it be tailored to include a space for the court to credit pretrial confinement time against the time adjudged, if it desires.

Courts are (or should be) instructed that pretrial confinement time is not credited against time adjudged, unless the convening authority takes certain action, or unless the court itself considers it. There is no known procedure in the military for a court to announce a certain sentence, and then recommend that the pretrial confinement time be credited against it. The Manual simply provides that the confinement time be announced in years, months or days. Perhaps courts should be permitted to impose a sentence of, say, five years confinement, and then announce conjunctively that "the time spent in pretrial confinement shall be credited against this sentence." This change in procedure remains in the future, however.

For the present, though, counsel might recommend that the sentence worksheet be amended to include the following:

1. "To be confined at hard labor for (_____(days) (months) (years) (the rest of your natural life.)

2, [MINUS] _____(days)(months) spent in pretrial confinement]

SENTENCE TO BE ANNOUNCED IN OPEN COURT, IF PRETRIAL CONFINEMENT IS TO BE CREDITED AGAINST SENTENCE ADJUDGED:

"To be confined at hard labor for _____(line 1 minus line 2) (days) (months) (years)."

RECENT CASES OF INTEREST TO DEFENSE COUNSEL

CONFESSIONS--RIGHT TO COUNSEL--A warning that the accused is entitled to "consult" counsel is inadequate. The accused must be specifically advised of his right to the presence of counsel during the interrogation. CM 418721, Moore, 22 January 1969.

SEARCH AND SEIZURE--An untested informant's tip is an inadequate basis for probable cause, where there is insufficient evidence of reliability and no other corroboration. People v. Parker, 4 CrL 2225 (Ill. Sup. Ct. 22 Nov. 1968).

NARCOTICS--PRESUMPTIONS--Insofar as it proclaims a statutory presumption that one who possesses marihuana knows that it had been illegally imported, the Narcotics Drugs Import and Export Act (21 U.S.C. §176a) is unconstitutional. It is impossible to tell from mere examination whether marihuana is imported or domestically grown. United States v. Adams, 293 F.Supp.776 (D.C.S.D.N.Y. 1968).

CROSS-EXAMINATION--If on cross-examination a prosecution witness refuses to answer, a motion to strike the entire testimony might be in order. United States v. Norman, 402 F.2d 73 (9th Cir. 1968).

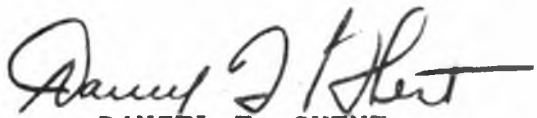
DISOBEDIENCE--An Article 90 disobedience specification fails to allege any offense when the words "his superior officer" are omitted. CM 418886, Brown, 27 February 1969.

CONFESSIONS-RIGHT TO COUNSEL--An FBI Agent's testimony in a desertion case that the accused gave a false identity when apprehended was inadmissible in the absence of any pre-interrogation warning. CM 419542, Allison, 4 March 1969.

RANDOM NOTES

***A good concise survey of all criminal law decisions in the United States Court of Appeals for the District of Columbia for the last year (sometimes an avant garde circuit) is contained in Volume 57, No. 2 of the Georgetown Law Journal (November 1968).

***It sometimes appears that military counsel have not read Simmons v. United States, 390 U.S. 377 (1968). This case followed Wade and held that a pretrial photographic identification may be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." HOWEVER, the burden is on the defense to show, on the record, the likelihood of such misidentification. This case suggests the type of evidence which will support a motion to suppress an in-court identification, and should be read in all cases where an in-court identification is to be offered following a pretrial photographic identification.



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