

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**W.L. RITTER**

**J.F. FELTHAM**

**E.S. WHITE**

**UNITED STATES**

**v.**

**Justin A. INABINETTE  
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200602228

Decided 12 June 2007

Sentence adjudged 4 May 2006. Military Judge: J.G. Meeks.  
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial  
convened by Commanding Officer, Headquarters Battalion, 1st  
Marine Division (Rein), Camp Pendleton, CA.

LCDR MATTHEW SCHELP, JAGC, USN, Appellate Defense Counsel  
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general order and wrongfully appropriating military property, in violation of Articles 92 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 921. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant assigns three errors. First, he contends his guilty pleas were improvident because the record clearly demonstrates a defense of lack of mental responsibility. Second, he argues his trial defense counsel were ineffective because they failed to present a lack of mental responsibility defense and failed to present clemency matters related to his mental health problems. Finally, the appellant argues the sentence was inappropriately severe.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's

answer, we conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

## I. Providence of the Plea

### A. Standard of Review

Whether the providence of a guilty plea is reviewed *de novo* or for abuse of discretion is unclear. In *United States v. Shaw*, \_\_\_ M.J. \_\_\_, No. 06-0403, 2007 CAAF LEXIS 537, at 4 (C.A.A.F. April 24, 2007), our superior court said "'A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.'" *Id.* (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)(citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995))). By contrast, in *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), the Court said, "We review claims as to the providency of a plea under a *de novo* standard." *Id.* at 267 (citing *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(military judge's legal conclusion appellant's pleas were provident reviewed *de novo*)).

A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Carr*, 65 M.J. 39, No. 06-0758, 2007 CAAF LEXIS 629, at 5 (C.A.A.F. May 9, 2007); *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973)(hereinafter the "Prater substantial basis test"). For the reasons set out below, we conclude the proper standard of review is abuse of discretion, with the degree of deference accorded to the military judge defined by the Prater substantial basis test.

In general, "abuse of discretion" as a standard of review is commonly used in two different ways. Sometimes, "abuse of discretion" is a conclusory label, such as when it is said a lower court abused its discretion because its findings of fact were clearly erroneous or because it was mistaken on the law. 19 *Moore's Federal Practice* § 206.05[1] (Matthew Bender 3d ed.); see *United States v. Parker*, 62 M.J. 459, 465 (C.A.A.F. 2006); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). In such cases, factual findings have actually been reviewed under a "clearly erroneous" standard, and legal determinations under a *de novo* standard. To say the lower court abused its discretion may be a technically correct usage of this "term of art," but it can obscure the true standard of review.

On the other hand, "abuse of discretion" may also indicate the appellate court will defer to a lower court's discretionary decision so long as that decision was within a range of

reasonable possible decisions. 19 *Moore's Federal Practice* § 206.05[1]. Often, such situations arise where a lower court must apply the law to a set of facts. The appellate court will normally review *de novo* the law applied by the lower court, and will reverse only a clearly erroneous factual finding. It will, however, often review the discretionary act of applying the law to the facts under a standard affording the lower court some degree of deference, though something short of the clearly erroneous standard by which it examines factual findings. Such is the case when a military judge decides there is a factual basis to accept a guilty plea.

A military judge may only accept a guilty plea if there is a factual basis for it, and must reject it if the accused sets up matter inconsistent with the plea or if the plea appears improvident. Art. 45, UCMJ; RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). In deciding whether to accept a guilty plea, a military judge has broad discretion to "err on the side of caution." *Parker*, 62 M.J. at 465 (C.A.A.F. 2006)(quoting *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987)). A military judge may not, however, arbitrarily reject a guilty plea. *Penister*, 25 M.J. at 152; see *United States v. Johnson*, 12 M.J. 673 (A.C.M.R. 1981); *United States v. Williams*, 43 C.M.R. 579, 582 (A.C.M.R. 1970).

From the foregoing, it is clear there are situations in which no military judge could accept an accused's plea, because it lacked a factual basis or because of matters in the record inconsistent with the plea. At the other extreme, there are cases where there is clearly more than enough factual support for the plea, and the military judge must accept the plea. In between those two extremes, however, the military judge has discretion to accept or reject the plea. Because the military judge exercises discretion, the decision to accept a guilty plea is entitled to deference on appellate review, and it is appropriate to review that decision for abuse of discretion. The *Prater* substantial basis test establishes the degree of deference. *Prater*, 32 M.J. at 436; see *Shaw*, 2007 CAAF LEXIS 537, at 4; *Logan*, 47 C.M.R. at 3.

Further, application of *de novo* review is inconsistent with the *Prater* substantial basis test, universally recognized as controlling. If appellate review of the providence of a guilty plea was truly *de novo*, the appellate court would not look for a substantial basis to question the plea. Rather, it would ask whether it would have accepted the plea on the record before it. *De novo* review is, therefore, inconsistent with *Prater*.<sup>1</sup>

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<sup>1</sup> A close reading of *Pena* and *Harris*, the two cases in which our superior court said it was conducting a *de novo* review, reveals those cases dealt with the legal obligations of the military judge, not with the military judge's exercise of discretion. In *Harris*, the Court decided whether the military judge was obliged to explore the impact of potential mental health issues on an accused's plea. In *Pena*, the Court decided whether the military judge had a duty to inquire into the accused's understanding of collateral consequences

## B. Principles of Law

The providence inquiry must establish not only that the accused himself believes he is guilty, but also that the factual circumstances objectively support the plea. *Harris*, 61 M.J. at 398; *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Inconsistencies and apparent defenses must be resolved, or the military judge must reject the plea. *Shaw*, 2007 CAAF LEXIS 537, at 5; *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006); *United States v. Jennings*, 1 M.J. 414 (C.M.A. 1976). "The existence of an apparent and complete defense is necessarily inconsistent with a guilty plea." *Shaw*, 2007 CAAF LEXIS 537, at 5-6.

An accused is presumed to have been mentally responsible unless and until the accused establishes lack of mental responsibility. To establish lack of mental responsibility, the accused must prove, by clear and convincing evidence, that, at the time of the commission of the acts constituting the offense(s), as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or wrongfulness of his acts. R.C.M. 916(b) and (k); see *United States v. Collins*, 60 M.J. 261, 265 (C.A.A.F. 2004); *United States v. Massey*, 27 M.J. 371, 374 (C.M.A. 1989); *United States v. Estes*, 62 M.J. 544, 548 (Army Ct.Crim.App. 2005).

## C. Analysis

The appellant claims his pleas were improvident because of evidence in the record that he was not mentally responsible for his conduct. The military judge clearly recognized the potential defense of lack of mental responsibility, and extensively inquired into it with the appellant, the forensic psychiatrist called by the defense during presentencing, and the trial defense counsel. Consequently, the factual record is well-developed. While the appellant is undoubtedly mentally ill, the record does not reveal a substantial basis in law and fact to question his guilty plea.

The appellant, his trial defense counsel, and his civilian defense counsel were all fully aware of his psychiatric condition and of the defense of lack of mental responsibility. Prior to trial, two sanity boards convened pursuant to R.C.M. 706, had examined the appellant and found him mentally responsible. Further, he had subsequently been evaluated by his own forensic psychiatrist, Dr. Clark Smith. Clearly, trial defense counsel advised the appellant to make a tactical decision not to raise the affirmative defense of lack of mental responsibility, and to plead guilty. Further, the appellant repeatedly admitted during

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of his guilty plea. Since these cases ruled on the legal duties of military judges, rather than reviewing discretionary decisions, it makes sense the court reviewed those cases *de novo* rather than for abuse of discretion.

the providence inquiry that he knew his actions were both wrong and illegal at the time. Those admissions are bolstered by the very logic of his proffered motive for the offenses -- a desire to get caught mailing dangerous items to his grandparents, get in trouble, and, as a result, get transferred out of Iraq. While one might doubt the wisdom of that plan, it does indicate the appellant clearly understood his actions were wrong.

Nor is substantial doubt cast on the providence of the appellant's pleas by the testimony of Dr. Smith. At one point during his testimony, Dr. Smith was asked by the military judge whether, in his opinion, the appellant had been able to appreciate the nature and quality or wrongfulness of his conduct at the time of the offenses. Dr. Smith replied, "I haven't been presented with incontrovertible evidence he was not capable. I think, because of the severity of his illness, there exists that question, yes."<sup>2</sup> Record at 145.

Later, however, the defense recalled Dr. Smith to clarify his testimony. He opined the appellant could tell right from wrong at the time of the offenses. Record at 153. In evaluating the appellant, he explained, he had spoken with family members who indicated that, in mid-January 2005, the appellant was having mood swings and acting differently from his usual behavior. They did not, however, indicate the appellant was psychotic or unable to tell right from wrong. *Id.* Dr. Smith opined it was entirely possible the appellant was not psychotic and able to tell right from wrong in mid-January, yet actively psychotic on 14 February. He explained that a person with Bipolar Disorder cycles from depression to mania, passing through periods of normality, with patients cycling between extremes at different rates. The appellant, Dr. Smith testified, cycles rapidly, meaning he could have gone from being mentally responsible on 20 January to being psychotic on 14 February. Further, Dr. Smith perceived an acceleration in the appellant's psychiatric deterioration after he was confined in the brig on 2 February, further decreasing the likelihood his psychosis on 14 February indicated a lack of mental responsibility around 20 January. Finally, Dr. Smith testified the appellant told him he was able to appreciate the nature and quality or wrongfulness of his actions at the time of the offenses, and Dr. Smith said he had no evidence to the contrary. *Id.* at 157-58.

At best, Dr. Smith indicated he had a question about the appellant's mental responsibility. But the appellant needs to do more than raise a question about his mental responsibility to have a defense; he must prove it by clear and convincing evidence, and Dr. Smith's testimony fell well short of that mark. Since neither the providence inquiry nor the evidence suggested the

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<sup>2</sup> Dr. Smith diagnosed the appellant with Bipolar I Disorder, with psychotic features. He testified that, based on his review of the appellant's medical and hospital records, the appellant was psychotic on 14 February 2005, while hospitalized at Naval Medical Center, San Diego.

possibility the appellant might be able to establish his lack of mental responsibility by clear and convincing evidence, there is not a substantial basis to question the plea. Accordingly, the military judge did not abuse his discretion in accepting the appellant's plea.

## **II. Ineffective Assistance of Counsel**

The appellant contends his trial defense counsel (including civilian defense counsel) rendered ineffective assistance because they failed to raise a lack of mental responsibility defense at trial, and failed to submit clemency matters to the convening authority. We disagree.

We determine *de novo* whether trial defense counsel were ineffective, and if so, whether that error was prejudicial. *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999); *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997); *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996). Counsel are strongly presumed to have provided adequate representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998); *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). To rebut this presumption, the appellant must demonstrate counsel's errors were unreasonable under prevailing professional norms and objectively so serious as to deprive the appellant of a fair trial, the result of which is reliable. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004); *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001); *Curtis*, 44 M.J. at 119. Additionally, the appellant must demonstrate a reasonable probability that, but for counsel's errors, the result would have been different. *Quick*, 59 M.J. at 386; *Wean*, 45 M.J. at 464. Conclusory allegations of ineffective assistance are not sufficient to overcome the presumption of competence afforded to counsel. The appellant has the obligation to bring the appellate court's attention to facts rather than mere speculation. *Russell*, 48 M.J. at 140-41.

### **A. Failure to Present Lack of Mental Responsibility Defense**

As noted in the discussion of the providence of the appellant's guilty pleas, the record is clear that trial defense counsel investigated the possible defense of lack of mental responsibility. They requested a sanity board, and also hired a forensic psychiatrist to evaluate the appellant. The record is also clear they, and the appellant, made a tactical decision not to attempt to prove lack of mental responsibility. Given the defense's burden of proof, and based on the testimony of Dr. Smith, their decision appears to have been a wise one.

## **B. Failure to submit clemency matters**

Mere failure to submit a clemency petition, by itself, does not automatically establish deficient representation. Each such failure must be assessed on a case-by-case basis. *United States v. Cobe*, 41 M.J. 654, 655 (N.M.Ct.Crim.App. 1994)(citing *United States v. Robertson*, 39 M.J. 211, 218 (C.M.A. 1994)). On 28 March 2003, this court announced that thereafter claims of inadequate representation based on failure to exercise post-trial rights would not be seriously entertained without an affidavit from the appellant stating how counsel's inaction contrasted with his wishes. Further, this court said if the claim involved counsel's failure to submit matters for consideration, the appellant must detail the content of the matters that would have been submitted. *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003).

In this case, the appellant fails to rebut the presumption of competence with respect to the lack of a clemency submission. First, the appellant has not submitted an affidavit, nor pointed to any other evidence, that counsel's failure to submit clemency matters was contrary to his wishes. Further, the record of trial already contained significant evidence concerning his mental illness, and the convening authority considered the entire record of trial before acting.

The appellant argues the failure to submit clemency matters was ineffective in this case particularly in light of the military judge's clemency recommendation. The military judge recommended the convening authority consider suspending the adjudged bad-conduct discharge if the defense could demonstrate a clear causal connection between the appellant's participation in combat in Iraq, or other stressors in his life at that time, and the onset of the severity of his bipolar disorder, level 1, with psychotic features. Record at 176. The appellant, however, has not provided any evidence he could have met the condition precedent in the military judge's clemency recommendation. Consequently, he has failed to demonstrate that his counsel were ineffective in not submitting clemency matters concerning his mental illness.

## **III. Sentence Severity**

Finally, the appellant contends that his sentence is inappropriately severe. We disagree. The appellant was a decorated combat veteran with a record of good performance, who clearly suffered from a serious mental illness. On the other hand, the record also established he knowingly and deliberately sent a fragmentation grenade through the mail from Iraq to his grandparents in Bakersfield, California, packed inside an old television set. In doing so, he placed many people, including fellow Marines, in serious danger, betrayed the trust of his comrades, undermined unit morale while the unit was deployed in a combat zone, and caused a serious distraction from important,

time-critical operational matters for his chain of command. We, therefore, find the sentence appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

#### IV. Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL  
Clerk of Court