14 October 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	) APPELLANT'S BRIEF IN SUPPORT) OF ISSUE PRESENTED
v.	) USCA Dkt. No. 09-5003/AF
Airman Basic (E-1) BRANDON T. ROSE, USAF, *Appellee*.	) Crim. App. Dkt. No. 36508

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), Uniform Code of Military Justice (UCMJ).

Statement of the Case

On 11 October 2005, a military judge sitting alone tried Appellee in a general court-martial at Scott Air Force Base, Illinois. Under the terms of a pretrial agreement, the Appellee pleaded guilty to multiple offenses, including: one specification each of attempted larceny, violation of a lawful order, drunk driving, forgery, house breaking, and obstructing justice in violation of Articles 80, 92, 111, 123, 130, and 134, UCMJ; eleven specifications of larceny, in violation of Article

121, UCMJ; and three specifications of indecent assault, also in violation of Article 134, UCMJ. The military judge sentenced Appellee to a dishonorable discharge and 20 months of confinement. (Jt. App. at 41.) The pretrial agreement had no impact on the adjudged sentence because it limited confinement to 24 months and Appellee was only adjudged 20 months confinement. (Jt. App. at 58.) On 7 November 2005, the convening authority approved the adjudged findings and sentence. He waived $1,235.10 of mandatory forfeitures for a period of six months or release from confinement, whichever was sooner, and directed that the waived forfeitures be paid to Appellee's wife.

Appellee initially raised the following three assignments of error on appeal pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982):

> Whether civilian defense counsel's erroneous advice that pleading guilty to indecent assault did not require [Appellee] to register as a sex offender;
>
> Whether [Appellee's] sentence to a dishonorable discharge was inappropriately severe; and,
>
> Whether [Appellee] is entitled to meaningful relief for being struck and verbally abused by a member of the confinement staff.

(*See* Appellee's Assignments of Error submitted to AFCCA on 21 Nov 06.)

After reviewing affidavits submitted by both parties, on 7 September 2007, the AFCCA ordered the record of trial be returned to the Judge Advocate General for referral to the convening authority to direct a post-trial hearing on the issue of ineffective assistance of counsel, in accordance with United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). The hearing was held on 8 January 2008. Subsequently, the Appellee filed the following non-Grostefon supplemental assignments of error:

> Whether civilian defense counsel's erroneous advice that pleading guilty to indecent assault did not require [Appellee] to register as a sex offender was ineffective assistance of counsel; and,
>
> Whether Appellee's plea to Specification 3 of Charge V [indecent assault] was improvident.

The AFCCA then specified one issue:

> Assuming, *arguendo* the conclusions found on page 3 of hearing exhibit 8 are accepted by this court and further assuming *arguendo* appellant's defense counsel's performance met the first prong of the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984), for ineffective assistance of counsel in that counsel was not functioning as counsel guaranteed the defendant by the sixth amendment of the United States constitution, whether the [Appellee] has suffered any prejudice within the meaning of the second prong of the Strickland test.

Following oral arguments on 27 August 2008, the AFCCA issued a 2-1 opinion on 12 February 2009 finding that Appellee met his burden of proof under both prongs of Strickland for

ineffective assistance of counsel and set aside the findings of guilty to those offenses. On 18 March 2009, the Air Force Court denied the government's Motion for Reconsideration.

On 8 April 2009, The Judge Advocate General, United States Air Force, certified the following issues under Article 67(a)(2), UCMJ:

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN DENYING THE UNITED STATES' REQUEST THAT THE COURT ORDER AN AFFIDAVIT FROM APPELLEE'S ORIGINAL MILITARY DEFENSE COUNSEL.

II.

WHETHER AN "IMPRESSION" LEFT BY CIVILIAN DEFENSE COUNSEL THAT APPELLEE MAY NOT HAVE TO REGISTER AS A SEX OFFENDER AMOUNTED TO AN AFFIRMATIVE MISREPRESENTATION AND LED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Following oral arguments on 23 September 2009, this Court issued an order setting aside the decision of the AFCAA and returning the case for remand to the lower Court to obtain an affidavit from Appellee's original assistant military defense counsel. The lower Court was ordered to conduct a new review of Issue II under Article 66(c), UCMJ.

After receiving the affidavit from Appellee's original assistant military defense counsel, the AFCCA sitting *en banc* found it to be unhelpful on the critical issue of advice concerning sex offender registration because the original

defense counsel had no recollection one way or the other as to whether he discussed the matter with Appellee. The AFCCA went on to reconsider its prior decision finding ineffective assistance of counsel. The AFCCA issued a closely-contested 3-2 opinion on 11 June 2010 finding that Appellee met his burden of proof under both prongs of Strickland for ineffective assistance of counsel and set aside the findings of guilty to those offenses. United States v. Rose, ACM 36508 (f. rev.) (A.F. Ct. Crim. App. 11 June 2010) (unpub. op.).

The Judge Advocate General, United States Air Force, recertified the following original issue under Article 67(a)(2), UCMJ, that had been deferred by this Court. Recognizing that AFCCA acted on the findings with respect to Specifications 1, 2, and 3 of Charge V, but not the remaining findings and sentence, this Court remanded the case back to the lower Court for a complete decision on all findings and a sentence. United States v. Rose, No. 09-5003/AF (C.A.A.F. 9 Nov 2010).

On 9 March 2011, AFCCA issued its third decision in this case. United States v. Rose, ACM 36508 (rem) (A.F. Ct. Crim. App. 9 March 2011) (unpub. op.). Despite this Court's remand order being limited to the specifications other than Specifications 1, 2, and 3 of Charge V, the lower Court's opinion again addressed its finding on Specifications 1, 2, and 3 of Charge V by dismissing those specifications. Id. at 2.

Granting the government's motion for reconsideration of their 9 March 2011 en banc decision, the Air Force Court of Criminal Appeals (AFCCA) issued another en banc decision on 15 August 2011 in order to follow the scope of this Court's second remand order. United States v. Rose, ACM 36508 (rem) (A.F. Ct. Crim. App. 15 August 2011) (unpub. op.), *rev'g en banc* Rose III. In this opinion, AFCCA set aside the findings of guilty to indecent assault in Specifications 1, 2, and 3 of Charge V consistent with its initial decision finding in Rose (I) that Appellee received ineffective assistance of counsel. Id. The Court also affirmed the findings of guilty to the balance of the charges, set aside the sentence, and authorized a rehearing on Specifications 1, 2, and 3 of Charge V and the sentence. Id.

Consistent with this Court's practice of requiring a new TJAG certification each time a Court of Criminal Appeals reaches a decision on remand, The Judge Advocate General of the Air Force certified the following issue on 14 September 2011:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

Statement of Facts

Appellee was convicted of, among many other offenses, indecently assaulting three different women between March and November 2004. (Jt. App. at 15.) The charges were preferred on 31 May 2005, and referred to a general court-martial. (Id.) At

the Article 32 hearing on 7 June 2005, Appellee was represented by a civilian defense counsel, Mr. NC, and a military defense counsel, Capt BG.[1] (Jt. App. at 26.) Capt BG remained Appellee's military defense counsel until he was released on 28 July 2005, and replaced by Capt TL,[2] a newly assigned Area Defense Counsel. (Jt. App. at 53, 118.) According to Capt TL, he came into the case at the "end of stream" amid trial and pretrial agreement discussions. (Jt. App. at 120.) At the 11 October 2005 trial, Mr. NC served as lead counsel for the trial defense team. (Jt. App. at 118.)

Appellee asserts that had he known that he would have to register as a sex offender, he would not have pled guilty to the indecent assault specifications. (Jt. App. at 91.) However, Mr. NC asserts that obtaining a pretrial agreement to limit confinement was the decisive factor in Appellee's decision to plead guilty to the indecent assaults. (Jt. App. at 108.) At the time of trial, Appellee believed that he was facing a maximum punishment of a dishonorable discharge, confinement for 37 years, and forfeiture of all pay and allowances.[3] (Jt. App. at 30.) Mr. NC engaged the convening authority in negotiations over a pretrial agreement. (Jt. App. at 107.) Mr. NC believed that the defense should try to negotiate the indecent assault

[1] Captain BG has since separated from the Air Force.
[2] Captain TL has since separated from the Air Force.
[3] There was a minor miscalculation by both trial and defense counsel. The maximum confinement for the offenses was 41 years and 6 months.

specifications away because they were "fairly innocuous types of charges from the point of view of the facts. There wasn't a lot of aggravation . . . the victims had subsequent contact with Airman Rose where they were acquaintances." (Jt. App. at 107-08.)

Appellee's initial offer was to plead guilty to all but the indecent assault charges, in return for a sentence cap of 15-18 months; however, the offer was rejected. (Jt. App. at 88.) According to Mr. NC, the legal office was adamant that in order to enter into a pretrial agreement, Appellee would have to plead guilty to all of the charges, including the indecent assault charges. (Jt. App. at 108.)

According to Appellee, after the rejection of the first offer, he asked Capt TL if he would be required to register as a sex offender if convicted of the indecent assault charge. (Jt. App. at 89.) Capt TL said he did not know and referred Appellee to Mr. NC as lead counsel. (Jt. App. at 124.) Mr. NC told Appellee that "he was not sure" and "I don't know . . . I'll look into it further." (Jt. App. at 92.)

Appellee says he was given the impression that he would not have to register because although Mr. NC said he did not know the answer, he also said, "I see no reason why you'd have to with these charges." (Id.) Appellee brought up the issue "two or three times" and got the same answer from Mr. NC that "he

would find out or he'd push it off." (Jt. App. at 100.) Appellee found the issue to be "real confusing" but "there was no way I could see it where he was telling me I'd have to." (Jt. App. at 93.) As Appellee put it:

> I know I got a he would find out one time, and then I know I got a he saw no reason why. I just know for a fact he never told me I'd have to, and the way he made it seem was I wouldn't have to by everything that he was saying, and he never raised the question asking me.

(Jt. App. at 101.)

Mr. NC explained why he never provided a definitive answer to resolve the question:

> [I]t was a function of the fact that we were concentrating on a range of issues including the length of confinement, the offer that the government was offering with respect to entering into a pretrial agreement. There was also some contextual circumstances, again, by way of explanation rather than excuse, concerning the sexual offense charges that we eventually pled to that, I would say, for lack of a better term, kind of eclipsed the issue as it was raised at the time.

(Jt. App. at 106.)

According to Mr. NC, limiting confinement was Appellee's controlling concern in deciding whether to plead guilty to the indecent assault. Mr. NC recalled, "it was finally settled on the importance of the term of confinement, a limitation of

confinement, in deciding to finally plead guilty to [the indecent assault specifications]." (Jt. App. at 108.)

During the trial, Appellee told the military judge that he considered his counsel competent to represent him, that he had had enough time to discuss the pretrial agreement and its ramifications with his defense counsel, and that he was satisfied that their advice concerning the agreement and their advice about the case was in his best interest. (Jt. App. at 36-40.) The military judge stated *sua sponte* that he would give Appellee "any more time you need to discuss any outstanding issues or questions you have with your lawyers, or we can press on." (Jt. App. at 39.) Appellee chose to press forward with the pretrial agreement without addressing the matter of sex offender registration.

On 11 Oct 2011, Appellee pled guilty to 7 charges with a total of 20 specifications. Relevant to the issue before this Court, Appellee pled guilty to the following three specifications of Charge V, violation of UCMJ, Article 134:

> Specification 1: In that [Appellee] United States Air Force, 375th Medical Operations Squadron Scott Air Force Base, Illinois, did, at or near Scott Air Force Base, Illinois, on or about 19 November 2004, commit an indecent assault upon N.B., a person not his wife, by kissing her, unzipping her pants, pushing up her shirt and bra, and fondling her breast, with intent to gratify his sexual desires.

> Specification 2: In that [Appellee] United States Air Force, 375th Medical Operations Squadron Scott Air Force Base, Illinois, did, at or near Scott Air Force Base, Illinois, between on or about 1 February 2004 and on or about 31 March 2004, commit an indecent assault upon A1C B.L., a person not his wife, by rubbing her naked back with his hand, moving his hand under the back of the waistband of her underwear, moving his hand around her waist to her stomach, and moving his hand up her chest, with intent to gratify his sexual desires.
>
> Specification 3: In that [Appellee] United States Air Force, 375th Medical Operations Squadron Scott Air Force Base, Illinois, did, at or near Scott Air Force Base, Illinois, between on or about 1 August 2004 and on or about 1 September 2004, commit an indecent assault upon A1C T.G., a person not his wife, by kissing her and grabbing her by the crotch, with intent to gratify his sexual desires.

Appellee claims he found out for the first time that he would have to register as a sex offender when he entered confinement.[4] (Jt. App. at 101.) After learning this information, he did not contact any of his defense counsel or obtain new counsel to raise the issue for him. (Id.) When he submitted clemency matters nearly a month later, this issue was

[4] Appellee has provided no proof that he is *actually* required to register as a sex offender nor that he *has* registered as a sex offender. The issue of whether the law at the time of his court-martial required him to register will be discussed *infra* p. 25-26. As of the date of this filing, a search of the Dru Sjodin National Sex Offender Public Website, available at http://www.nsopw.gov/Core/OffenderSearchCriteria.aspx, shows that Appellee, Brandon T. Rose, has not actually registered as a sex offender in any of the fifty states.

noticeably absent from any of his submissions. (Jt. App. at 63-71.) There was no discussion of reliance on misstatements from Appellee's civilian counsel or any other counsel, nor was there discussion of Appellee's understanding regarding whether he would have to register at the time he pled guilty. (Id.) The letters supporting Appellee's clemency request all asked the convening authority to reduce Appellee's sentence to either less than three months or less than six months and give him an administrative discharge. (Id.) His military defense counsel, Capt TL, asked that the convening authority reduce the confinement to 15 months and approve "any other form of clemency deemed appropriate." (Jt. App. at 63.) Appellee's personal clemency request states that, "I respectfully ask that I receive clemency regarding the length of my sentence be [sic] shortened to 15 months, if at all possible." (Jt. App. at 65.) Appellee made no mention of any error or request for relief based on his misunderstanding of sex offender registration from Mr. NC.

As part of her conclusions, the military judge at the DuBay hearing found that sex offender registration was "a key concern" for Appellee, but she did not make a finding that it was the controlling concern. (Jt. App. at 165.) Despite Appellee's testimony, the military judge also did not make a determination that Appellee would not have pled guilty and entered into the pretrial agreement if he had known that he would have to

register. (Jt. App. at 163-65.) The military judge determined that Appellee was never told that he would not have to register; instead, his question went unanswered. (Id.) Finally, she found that under the circumstances, Appellee was given a reasonable impression that he would not have to register. (Id.)

Summary of Argument

The AFCCA majority's decision improperly extends case law regarding affirmative misrepresentation of collateral consequences by defense counsel to include "impressions" by counsel, even when that counsel has clearly stated that he does not know the answer to Appellee's questions regarding collateral consequences. The majority's decision ignores persuasive evidence that there was no affirmative misrepresentation that Appellee would not have to register and that Appellee pled guilty because his controlling concern was limiting the length of confinement through a pretrial agreement. Further, the majority impermissibly and incorrectly presumed that defense counsel made affirmative misrepresentations about Appellee not needing to register when in fact, at the time of Appellee's court martial, the state law of the relevant two states in which Appellee was likely to reside (Florida and Alabama) did not require him to register on the sex offender registry and no federal law existed on the issue. Finally, Appellee suffered no prejudice as he was willing to plead guilty without a definitive

answer to the registration question, he ignored opportunities to clear up this issue with the military judge or his counsel, and he never raised the issue as an error in clemency. Appellee may not have received perfect representation, but he did receive effective representation.

Argument

CIVILIAN DEFENSE COUNSEL DID NOT AFFIRMATIVELY MISREPRESENT WHETHER APPELLEE WOULD HAVE TO REGISTER AS A SEX OFFENDER AND THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. United States v. Sales, 56 M.J. 255 (C.A.A.F. 2002); United States v. Burt, 56 M.J. 261 (C.A.A.F. 2002).

Law and Analysis

The test for a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). "This requires a showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 689.

The purpose of the effective assistance of counsel guarantee is "simply to ensure that criminal defendants receive a fair trial." Id. at 689. The record in the case *sub judice* demonstrates trial defense counsel's performance was not constitutionally deficient and Appellee was not prejudiced.

The Strickland test requires Appellee to first demonstrate counsel's performance was so deficient he was not functioning as counsel guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. This requires a showing that counsel's performance fell measurably below an objective standard of reasonableness; in other words, whether counsel's assistance was reasonable considering all the circumstances. Id. at 688. Counsel is presumed competent until proven otherwise. Id. at 689.

The second prong requires Appellee to show his counsel's deficient performance prejudiced the defense. Id. at 692. Appellee must show "specifically that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007). A reviewing Court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.A.A.F. 1993).

More recently, the United States Supreme Court issued its opinion in Harrington v. Richter, 131 S.Ct. 770 (2011), wherein the Supreme Court re-emphasized the high standard an appellant must overcome to establish an ineffectiveness of counsel claim on appeal. In that opinion, the Supreme Court stated, "Surmounting Strickland's high bar is never an easy task . . . . The question is whether an attorney's representation amounted to

incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." Id., 131 S.Ct. at 788 (internal citations omitted).

1. Counsel's actions did not constitute an affirmative misrepresentation of the collateral consequences of pleading guilty.

Appellee's civilian defense counsel, Mr. NC, prefaced each response to Appellee's questions about sex offender registration by stating that he did not know, or was not sure that his answer was correct. The DuBay hearing judge concluded, based on the evidence and her evaluation of the credibility of the witnesses, that AB Rose was never told that he would not have to register and that his question went unanswered. (Jt. Appt. at 165.) Nevertheless, a majority of the Court found that counsel's actions in this case rose to the level of an "affirmative misrepresentation" constituting ineffective assistance of counsel. United States v. Rose, ACM 36508 (f. rev.) (A.F. Ct. Crim. App. 11 June 2010) (unpub. op.).

Appellee's case is significantly different from cases cited by the majority of the AFCCA for the proposition that affirmative misrepresentations by counsel about significant collateral consequences of a conviction may constitute ineffective assistance of counsel. Rose, slip. op. at 3 (citing United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); United States v. Cuoto, 311 F. 3d 179 (2d Cir. 2002)). Those cases do

not involve the present facts where the counsel tells his client that he does not know the answer to the question or that he would have to look into it further, and was nevertheless found to be ineffective due to an impression to the contrary he left on the client.

In Kwan, the defendant asked his defense counsel whether pleading guilty in a bank fraud case would cause him to be deported. Kwan, 407 F.3d at 1008. The counsel did not state that he did not know the answer to that question; instead, he assured Mr. Kwan that based on his knowledge and experience there was no serious possibility of deportation, although there was a technical possibility. Id. This advice, however, was incorrect because a retroactive change in the definition of an aggravated felony made it almost certain that Mr. Kwan would be deported. Id. at 1009. Mr. Kwan's counsel did not inform him about this change in the law or that he could potentially avoid deportation by renegotiating his plea agreement or receiving a sentence of less than one year. Id.

In Cuoto, the defendant asked her attorney about the possibility of deportation if she pled guilty to bribing a public official. Cuoto, 311 F. 3d at 183. Her attorney assured her that they could deal with her immigration problem after the guilty plea, and said that while deportation was a possibility, there were many things that could be done to prevent her from

being deported, including asking the judge for a letter recommending against deportation. Id. His advice was incorrect because amendments to the law eliminated all discretion regarding deportation of non-citizens convicted of aggravated felonies and her plea of guilty meant virtually automatic, unavoidable deportation. Id.

Kwan and Cuoto are examples of cases where counsel gave incorrect advice that was contrary to the law; they are not cases where the counsel told the client that he did not know the answer to the question and was nevertheless found to be ineffective due to an impression he left on the client. *See also* Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985) (defendant entitled to evidentiary hearing to determine if his attorney affirmatively misrepresented him about the possibility of facing deportation proceedings). At the DuBay hearing, Appellee made it clear that Mr. NC did not actually tell him that he would not have to register and the military judge concluded that neither of AB Rose's trial defense counsel ever answered AB Roses's question about registration and never told him he would not have to register. (Jt. App. at 93, 165.)

Appellee asked his counsel a total of two or three times whether he would have to register as a sex offender if he accepted the pretrial agreement and pled guilty to the indecent assault charge. (Jt. App. at 100.) According to Appellee,

Mr. NC responded that he was not sure or he did not know, he would check into it, and he would look into it further. (Jt. App. at 89, 92-93.) Appellee initially stated in his declaration that Mr. NC told him that he would not have to register as a sex offender, but at the DuBay hearing he testified that he was actually never given any direct advice about whether he would have to register. (Jt. App. at 93.)

Ultimately, Appellee clarified that he was not actually told that he would not have to register; rather, he was left with an "impression" that he would not have to register based on Mr. NC generally downplaying the seriousness of the assaults and opining that he did not see why they would trigger registration. (Jt. App. at 89-90, 93.)

Importantly, on the two or three occasions that Appellee asked about this matter, the civilian defense counsel clearly told Appellee that he did not know or was not sure of the answer to his question and that he would have to look into it further. Nevertheless, the AFCCA skipped over the Dubay hearing judge's findings of fact without explanation and found that Appellee relied on advice of counsel that was reasonably calculated to lead Appellee to believe that he would not have to register as a sex offender. Rose, slip op. at 5.

Based on Mr. NC's responses, however, Appellee knew that he did not have a definitive answer to his question, and by his own

admission he was aware of the possibility that he might have to register based on "rumors" he heard. (Jt. App. at 89.) He decided to enter the pretrial agreement and plead guilty anyway, choosing to rely on his "impression" that he would not have to register as a sex offender if convicted, and not a definitive answer. The following exchange generally summarizes his understanding on the sex offender registration issue:

> TC: So it was just left open-ended. He was like saying, "I don't know."
>
> APP: Yes, Sir.
>
> TC: Mr. [NC] said, "I'll look into it further."
>
> APP: Yes, sir.
>
> TC: Okay. So you testified that, when you talked to Mr. [NC], you said, I believe the word you testified to was you were given the impression that you would not have to register as a sex offender.
>
> APP: Yes, Sir.
>
> TC: So he never came out directly and said you would not have to.
>
> APP: No. He just said, "I see no reason why you'd have to with these charges."
>
> TC: At one point, you testified that Mr. [NC] actually said that he wasn't sure.
>
> APP: Right. I was told so many different things that it kind of comes up being—in the end, I put it in my attorney's hands, and I said, "Hey, what's the best advice you can give me, you know, what to do?" He was like, "I don't see no reason why you'd have

> to register. My best advice is go ahead and sign the PTA."
>
> TC: So the issue was a little confusing?
>
> APP: Real confusing.
>
> TC: Okay. So is it possible you didn't necessarily completely understand what he was telling you?
>
> APP: The only thing I understood was that, from his—the way he looked at it, I would not have to. That's what I understood. There was no way I could see it where he was telling me I'd have to.
>
> TC: Okay, but he never said that directly. He said he's not sure. He'd check into it.
>
> APP: Yes, sir.

(Jt. App. at 92-93.)

Appellee acknowledges that his counsel told him he did not know the answer and that Mr. NC said was going to look into to it further but never did. Appellee found the advice confusing.

Surely the advice would not have been so confusing if it was actually an unequivocal *affirmative* statement which Appellee later found was a misstatement of the law. Counsel's advice, however, could not have amounted to an affirmative misstatement when Appellee admits Mr. NC did not answer his question. Instead, Mr. NC left Appellee with the equivocal response that he was not sure and he would check into it. This does not support the view that the totality of Mr. NC's response amounted to an affirmative misstatement. That totality of the facts

includes the repeated caveats, “I don’t know,” “I’m not sure,” and “I have to look into it further.” It is self-contradicting to find that those statements could be a part of Mr. NC’s response and the answer could still be considered an affirmative misstatement. Mr. NC’s statements are clearly statements of equivocation. Appellee acknowledged that his counsel did not affirmatively tell him he did not have to register; he just knew that they also were not saying that he *did* have to register.

When considering the totality of Mr. NC’s response, the “reasonable impression” Appellee had that he would not have to register as a sex offender for an indecent assault charge seems grounded in wishful thinking, or at least a desire to accept the idea that Appellee was safe so long as no attorney affirmatively stated that he *did* have to register. In this case, there was no affirmative statement that he did have to register and no affirmative misstatement that he did not. As the DuBay military judge found from Appellee’s own testimony, Appellee’s question went unanswered. This supports the conclusion that Mr. NC never made an affirmative misstatement but instead failed to answer the question.

Not receiving an answer to a question about collateral consequences is fundamentally different from being given incorrect advice. This Court has already held that the complete failure to provide any advice on the need to register as a sex

offender if convicted does not constitute deficient performance under the first prong of Strickland and so "does not rise to the level of ineffective assistance of counsel." United States v. Miller, 63 M.J. 452, 458 (C.A.A.F. 2006). In the same vein, one would expect a counsel who did not know or was unsure of the answer to a question about a collateral matter to tell the client he did not know or was unsure. Mr. NC told Appellee he was unsure of the answer each time he addressed the issue. That does not amount to a constitutionally deficient performance within the meaning of Strickland.

This comports with the tenor of the holding in the recent Supreme Court deportation decision, Padilla v. Kentucky, 130 S. Ct. 1473 (2010), where the Court held that when the law on deportation is not succinct and straightforward, a criminal defense attorney need do no more than advise the accused that pending criminal charges may carry a risk of adverse immigration consequences. When the law is clear, however, the advice must also be clear. Id. at 1483.

The Constitution does not require defense counsel to know about all of the collateral consequences an accused might be faced with across multiple jurisdictions, especially in the area of law which encompasses a "plethora of sexual offender registration laws enacted in each state . . . ." Miller, 63 M.J. at 459. Mr. NC noted at the DuBay, "as I sit here right

now, I still don't consider myself a duty expert on the various registration requirements as required by the various state laws." (Jt. App. at 107.) The Constitution does not require him to know this information.

An "impression," even a reasonable impression, is not sufficient to conclude this rises to the level of ineffective assistance of counsel. To hold otherwise opens the floodgates to all manners of impressions an accused may draw from his counsel's demeanor, words, or lack of response. For example, if a defense attorney said that he felt confident based on the circumstances that an accused would be acquitted or even win a motion, and the results were instead negative, appellants would argue ineffective assistance of counsel based on the "impression" of confidence. This truly lowers the bar for ineffective assistance of counsel and opens the door for many frivolous attacks on defense counsel.

This lowering of the bar would apply not just to sex offender registration cases, but all cases involving collateral matters. It would encourage collateral attacks of guilty pleas whenever a defense counsel fails to answer every question related to a collateral consequence of a guilty plea posed by an accused. While the United States does not hold Mr. NC's performance of failing to provide a direct answer even after saying he would look into it further as the model example, the

cases cited by the majority do not stand for the proposition that the failure amounts to a constitutional defect.

Furthermore, even assuming *arguendo* that civilian defense counsel actually rendered an opinion by advising Appellee that he would not have to register, the lower Court incorrectly jumped to the conclusion that this constituted an "affirmative misrepresentation." Put simply, at the time of Appellee's court-martial civilian defense counsel was correct –- relevant state law did not require Appellee to register and no federal law required registration.[5] Although a Department of Defense regulation[6] listed Appellee's offense as one that "trigger[s] requirements to notify State and local law enforcement agencies and to provide information to inmates concerning sex offender registration requirements," state law controlled whether an offense warrants registration. Moreover, it is *Appellee's* burden to prove that his counsel were inaccurate or failed to act in an objectively reasonable manner; but for bald assertions of sexual registration requirements, Appellee has failed to meet his burden.

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[5] AFCCA's reliance on 42 U.S.C. § 16911 as authority for its finding that "registration is required by federal law" is misplaced. (Jt. App. at 4-5.) This federal sex offender registration and notification law was passed as part of the Adam Walsh Child Protection and Safety Act of 2006 on 27 July 2006 -- nine months *before* Appellee's court-martial. Pub. L. 109-248, 120 Stat. 587 (2006).

[6] DoDI 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Enclosure 27, July 17, 2001.

Two states –- Alabama and Florida[7] -– were of concern to Appellee's potential need to register as a sex offender. (Jt. App. at 118.) A survey of the sexual registration statutes in these two states at the time of Appellee's court martial makes clear that Appellee was *not* required to register as a sex offender. FLA. STAT. ANN. § 943.0435 (2005); ALA. CODE § 15-20A-5 (2005). The sexual crimes triggering registration requirements in each of these state statutes required the sexual act involve force or threat of violence, a minor victim, or penetration of a sexual organ. *See e.g.,* FLA. STAT. ANN. § 794.011 (2005) (defining criminal sexual battery as an act requiring oral, anal, or vaginal penetration of a sexual organ). Appellee's crimes, while done to gratify his sexual desires, involve no force and instead include rubbing one victim's back, kissing two victims, and fondling one victim's breasts. (Jt. App. 17-18.) As his crimes did not rise to the level requiring registration at the time of his court-martial, the lower Court's finding that Appellee's counsel made misrepresentations is incorrect and

[7] Appellee's trial defense counsel also indicated Illinois as a possible state of interest to Appellee's concerns of registration. (*See* Jt. App. at 118.) Although Appellee committed his crimes in Illinois (Jt. App. at 17-18), he provided no indication of an intent to reside there. Instead, Appellee put Florida as his address for Appellate correspondence (A.F. Form 304, Request for Appellate Defense Counsel, ROT Vol. 3) and testified he was living in Alabama at the DuBay hearing. (Jt. App. at 87.) As such, the government examined Florida and Alabama registration requirements.

should be reversed as a matter of law. Even assuming Appellee's counsel did affirmatively state that registration was not required in the relevant states, such a representation necessarily meets the objective standard of reasonable under Strickland because it was *correct* and not a misrepresentation. As such, this Court should reject the lower Court's finding of ineffective assistance of counsel and find Appellee failed to meet his burden under the first prong of Strickland.

2. It is not reasonable to believe that, but for the impressions of counsel, Appellee would have pled not guilty and given up his pretrial agreement.

Appellee has also failed to establish the prejudice prong of the Strickland test. While Appellee claims that he would not have pled guilty to the indecent assault charges if he had known that he would "have to" register as a sex offender, Appellee has neither proved that he was required to register as a sex offender *nor* that he has registered. As explained *supra*, at the time of Appellee's conviction for Charge V, Specifications 1-3, he was not required to register under sex offender registration laws in either Florida or Alabama. FLA. STAT. ANN. § 943.0435 (2005); ALA. CODE § 15-20A-5 (2005). While Appellee claims he had to sign some forms "for sex registration" when entering into Scott Air Force Base confinement[8] (Jt. App. at 90), he has never

[8] Pursuant to DoDI 1325.7, *supra* n.6, Appellee likely filled out DoD Form 2791, Notice of Release/Acknowledgement of Convicted

produced evidence of said forms nor evidence that he was required to register with any state. To the contrary, it is clear Appellee has *not* registered as a sex offender in any state. *See supra* n.4. In sum, if Appellee cannot prove that his "impressions" from his trial defense counsel were incorrect by showing that he was required and has in fact registered as a sex offender, Appellee fails the second Strickland prong because he can show no prejudice.

Even assuming Appellee met his burden to show that the "impression" left by his trial defense counsel was incorrect, Appellee fails the second prong of Strickland because Appellee's main concern was limiting his time in confinement, even if he had known for sure that he would have to register. If Appellee was willing to gamble with the risk of sex offender registration issue by pleading guilty with his question unanswered, then it seems clear that sex offender registration was not the controlling issue for him. The DuBay military judge found it to be a "key concern" of Appellee but not the controlling concern. (Jt. App. at 165.) The desire to limit confinement and have a "safety net of twenty-four months" was the reason Appellee

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Sex Offender Registration Requirements. Per the DoD Instruction paragraph 6.18.5 and enclosure 27, this form serves to notify prisoners convicted of any offense listed in enclosure 27 of registration requirements of the State in which the prisoner will reside upon release from confinement. This form, however, does not set the policy for state sex offender registration requirements -- state law does.

agreed to all of the conditions of the pretrial agreement, so it follows that limiting confinement was the controlling issue. (Jt. App. at 88, 108.)

Appellee decided to sign the pretrial agreement and plead guilty to the indecent assaults despite the issue of sex offender registration being "confusing," despite never getting a direct answer to his question, and despite never being told by anyone that he would not have to register as a sex offender. Yet at the time of the trial, Appellee was a 23-year-old Airman, who had two years of college before entering the Air Force, who was married with a 3-year-old son, who was routinely described as "smart," and who had previous experience with at least three attorneys. (*See* Jt. App. at 63-71, 84.)

Appellee's behavior at trial was not in keeping with what one would expect from someone who found sex offender registration to be the controlling concern. He was willing to enter into a quite favorable pretrial agreement (PTA) and plead guilty to the indecent assaults knowing that his sex offender registration question had gone unanswered. His willingness to plead guilty without a definitive answer demonstrated that sex offender registration may have been a "key concern" but not the controlling concern. Mr. NC testified that the controlling concern was the length of potential confinement. (Jt. App. at 108.)

Appellee was certainly free to decide which issue was the "deal breaker" for him. His actions show that he chose to limit confinement, which makes sense given the significant amount of confinement he was facing. The PTA was heavily negotiated by Mr. NC and capped a 41 years and 6 month confinement maximum at 24 months. When Appellee was asked why he entered into the pretrial agreement, he testified that:

> My understanding was originally we set up trying for a PTA of like, I believe, it was fifteen or eighteen months and me plead to the larceny and the breaking and entering and not plead to the three indecent assaults, and that was sent back. He said, "Okay, let's plead to everything because the assaults are not the worst part of the case. The worst parts of the case are the ones that you want to plead to anyway, so go ahead and just plead out so we have a safety net of twenty-four months, and then we try to beat the twenty-four months with the different extracurricular activities and the sentencing phase," pretty much.

(Jt. App. at 88.)

Appellee entered the pretrial agreement to have a safety net of twenty four months in confinement, and Mr. NC was able to garner a sentence that beat that cap by four months.

At trial, Appellee told the military judge that he considered his counsel competent to represent him, that he had had enough time to discuss the pretrial agreement and its ramifications with his defense counsel, and that he was satisfied that their advice concerning the agreement and their

advice about the case was in his best interest. (Jt. App. at 36-40.) The military judge even stated *sua sponte* that he would give Appellee "any more time you need to discuss any outstanding issues or questions you have with your lawyers, or we can press on." (Jt. App. at 39.) Appellee did not take that opportunity to get a direct answer to his purported outstanding question regarding sex offender registration; instead, he pressed forward with the pretrial agreement. He had the opportunity to clear up this issue but did not. He knew he did not have an answer, and he also knew he was getting a limit on confinement. If the issue was so important, he would have taken this golden opportunity to get a direct answer.

Given that Appellee's explanation regarding the reason he entered into the pretrial agreement included having a safety net on confinement and that Mr. NC testified that limiting confinement was the overriding concern in deciding to plead guilty to the indecent assaults, it is clear that limiting confinement was Appellee's most important concern in deciding to accept the terms of the pretrial agreement.

Appellee's behavior after he says he found out that he would have to register also supports the conclusion that limiting confinement -- not sex offender registration -- was his most important concern. His actions are wholly inconsistent with someone who discovered that he was advised wrongly by his

counsel on an issue that had been the whole reason he decided to accept the terms of the pretrial agreement in the first place.

Appellee did not contact his previous counsel or find a new attorney to raise the issue on his behalf. He did not formally or informally bring the matter to the attention of the legal office, his commander, the military judge or the convening authority. He basically did nothing to raise the issue even when given another golden opportunity during clemency.

According to Appellee, he found out that he would actually have to register as a sex offender his first day in confinement. (Jt. App. at 90.) Appellee was sentenced on 11 October 2005 and submitted clemency dated 3 November 2005. (Jt. App. at 63.) Instead of immediately contacting his attorneys for clarification upon learning about the registry, or trying to do anything to correct the situation, Appellee says that he refused to talk to his attorneys because he was so angry that he was betrayed and tricked into signing a pretrial agreement. (Jt. App. at 101.) The DuBay Hearing judge asked, "So you at no point wanted to talk to either of them about the advice they gave you when you found out you were going to have to register?" Appellee answered, "No, ma'am, I didn't want to talk to either one of them about it." (Jt. App. at 102.)

Interestingly, despite his new-found knowledge, Appellee's clemency submission also did not address the sex registry issue.

The letters supporting Appellee's clemency request all asked the convening authority to reduce Appellee's sentence to either three or six months or less and give him an administrative discharge. (Jt. App. at 63-70.) None of them talked about Appellee being somehow "duped" into pleading guilty to the indecent assaults, and therefore having to unjustly suffer the sex offender registry. His military defense counsel only asked in clemency that the convening authority reduce the confinement to 15 months and approve "any other form of clemency deemed appropriate." (Id.) There was no discussion of problems with Appellee's civilian counsel or Appellee's understanding of whether he would have to register anywhere within the clemency submission. (Id.)

Finally, and most importantly, Appellee's own clemency letter only states that, "I respectfully ask that I receive clemency regarding the length of my sentence be [sic] shortened to 15 months, if at possible." (Jt. App. at 65.) Over the next two pages, Appellee discusses reasons that he should receive clemency, and none of them include his misunderstanding of whether he would have to register as a sex offender if he pleaded guilty to the indecent assaults. (Id.) This is also telling, given that Appellee has a three-year-old son who could suffer the effects of Appellee having to register as a sex offender.

Instead of making the sex registry matter an issue, Appellee maintained the same military defense attorney in clemency and asked for reduced confinement. If the issue of sex offender registration was as important to the plea as Appellee asserts on appeal, he would have cleared up the issue when given the opportunity by the military judge, or at least raised the issue during clemency. The fact that Appellee chose to press forward with his pretrial agreement without having a definitive answer to his question and that he did not raise any issue in clemency other than reducing confinement, supports the government's position. Appellee was not prejudiced and his convictions should not be set aside.

Conclusion

For the foregoing reasons, the United States respectfully requests this Court, in its de novo review, find that trial defense counsel provided effective assistance of counsel and that the Air Force Court erred by setting aside the findings of guilty to indecent assault in Specifications 1, 2, and 3 of Charge V, and by setting aside the sentence.

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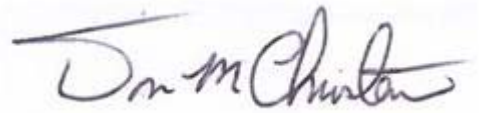

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 14 October 2011.

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/s/

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