14 November 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

Brandon T. Rose
Airman Basic (E-1),
UNITED STATES AIR FORCE,
Appellee.

Crim. App. No. ACM 36508

USCA Dkt. No. 09-5003/AF

BRIEF ON BEHALF OF APPELLEE

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Decisional Issue

Whether Appellee's civilian defense counsel provided ineffective assistance of counsel by providing advice concerning sex offender registration that would lead a reasonable listener to believe that such registration would not be required when, in fact, registration was required; Appellee credibly testified that he would have pleaded not guilty to the offenses requiring registration had he been properly advised; and Appellee's civilian defense counsel would not have recommended that Appellee plead guilty to the offenses had he known they would require registration.

Statement of Statutory Jurisdiction

Appellee's approved sentence included both a dishonorable discharge and confinement for more than a year, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. *See* Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). On August 15, 2011, the Air Force Court of Criminal Appeals issued a second

decision in this case. *United States v. Rose*, No. ACM 36508(rem) (A.F. Ct. Crim. App. Aug. 15, 2011) (en banc) [Appendix]. On September 14, 2011, the Judge Advocate General of the Air Force filed a certificate for review, bringing this case within this Court's jurisdiction. *See* Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2006).

Statement of the Case

On October 11, 2005, Appellee was tried by a general court-martial composed of a military judge alone convened by the Commander, Eighteenth Air Force (AMC). In accordance with his pleas, Appellee was found guilty of one specification of attempted larceny in violation of Article 80, UCMJ, one specification of violating of a lawful order in violation of Article 92, one specification of drunk driving in violation of Article 111, eleven specifications of larceny in violation of Article 121, one specification of forgery in violation of Article 123, one specification of housebreaking in violation of Article 130, one specification of obstructing justice in violation of Article 134, and three specifications of indecent assault in violation of Article 134. 10 U.S.C. §§ 880, 892, 911, 921, 930, 934 (2000).

Also on October 11, 2005, the military judge sentenced Appellee to a dishonorable discharge and confinement for 20

months. J.A. 41.[1] On November 7, 2005, the convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Convening Authority's Action.

On February 12, 2009, the Air Force Court of Criminal Appeals set aside the findings of guilty to the three indecent assault specifications. *United States v. Rose*, 67 M.J. 630 (A.F. Ct. Crim. App. 2009) (J.A. 1), *rev'd*, 68 M.J. 236 (C.A.A.F. 2009). The court affirmed the findings of guilty to all of the charges and the remaining specifications. The Air Force Court also set aside the sentence and authorized a rehearing with respect to the three specifications it set aside and the sentence.

On April 8, 2009, the Judge Advocate General of the Air Force filed a certificate for review. *United States v. Rose*, 67 M.J. 402 (C.A.A.F. 2009). On October 28, 2009, this Court set aside the Air Force Court's decision and remanded the case for a new review under Article 66(c). *United States v. Rose*, 68 M.J. 235 (C.A.A.F. 2009) (summary disposition).

[1] The Government's brief appears to use the joint appendix previously filed with this Court in 2010 as the source for joint appendix citations. Appellee's answer will do the same while providing the Air Force Court's opinions upon remand in the appendix to this answer.

Upon remand, on June 11, 2010, the Air Force Court of Criminal Appeals once again set aside the findings of guilty to the three indecent assault specifications. J.A. 177 (en banc).

On July 12, 2010, the Judge Advocate General of the Air Force filed another certificate for review in this case. *United States v. Rose*, 69 M.J. 198 (C.A.A.F. 2010). On November 9, 2010, this Court noted that the Air Force Court's second opinion did not take action with regard to some of the findings and the sentence. *United States v. Rose*, 69 M.J. 426 (C.A.A.F. 2010) (summary disposition). This Court remanded the case to the Air Force Court to complete its Article 66(c) review. *Id*.

On March 9, 2011, the Air Force Court issued an opinion upon remand. *United States v. Rose*, No. ACM 36508 (rem) (A.F. Ct. Crim. App. March 9, 2011) (en banc) [Appendix A]. On April 7, 2011, the Government moved for reconsideration. On August 15, 2011, the Air Force Court granted reconsideration, noted that it had previously set aside the findings of guilty as to Specifications 1, 2, and 3 of Charge V, affirmed the remaining findings of guilty, set aside the sentence, and authorized a rehearing on Specifications 1, 2, and 3 of Charge V and the sentence. *United States v. Rose*, No. ACM 36508 (rem) (A.F. Ct. Crim. App. Aug. 15, 2011) (en banc) [Appendix B].

On September 30, 2011, Appellee filed a petition for grant of review and an accompanying supplement raising a challenge to

Appellee's Article 134 convictions based on this Court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *United States v. Rose*, __ M.J. __, No. 09-5003/AF (C.A.A.F. Oct. 28, 2011). That petition remains pending before this Court.

Statement of Facts[2]

At his general court-martial, Appellee was represented by a civilian defense counsel, Neal Connors, and by Captain (Capt) Todd Logan. R. at 4. Capt Logan "was a relatively new ADC at the time and Mr. Connors was the lead attorney. Because of this, [Capt] Logan was very deferential to Mr. Connors' handling of AB Rose's case." J.A. 164.

At his court-martial, Appellee pleaded guilty to, among other offenses, three indecent assault specifications. R. at 12. The military judge found him guilty in accordance with his

[2] In its statement of facts, the Government makes a factual assertion, unsupported by the record, that a search of a database purportedly "shows that Appellee, Brandon T. Rose, has not actually registered as a sex offender in any of the fifty states." Government's Brief at 11 n.4. The Government's reliance on matters from outside the record is improper. Rule 30A of this Honorable Court's Rules of Practice and Procedure provides that this "Court will normally not consider any facts outside of the record established at the trial and the Court of Criminal Appeals." C.A.A.F. R. 30A(a). Rule 30A continues, "Requests to consider factual material that is not contained in the record shall be presented by a motion to supplement the record filed pursuant to Rule 30." *Id*. This Court should decline to consider the statements in footnote 4 of the Government's brief, which contravene Rule 30A, as well as the Government's brief's later reliance on footnote 4. *See* Government's Brief at 28.

pleas. J.A. 40. Appellee and the convening authority had entered into a pretrial agreement providing for disapproval of confinement in excess of 24 months. Appellate Exhibit V. Appellee's adjudged sentence, however, consisted of only a dishonorable discharge and confinement for 20 months. J.A. 41.

When Appellee's case was first pending before the Air Force Court, that court remanded the case for a hearing pursuant to *United States v. DuBay*, 17 C.M.R. 147, 37 C.M.R. 411 (1967), to determine whether Appellee received ineffective assistance of counsel due to misadvice concerning whether Appellee would have to register as a sex offender if he pleaded guilty to the three indecent assault specifications. *United States v. Rose*, No. ACM 36508 (A.F. Ct. Crim. App. Sept. 7, 2007) (order).

Before entering into a pretrial agreement and pleading guilty, Appellee repeatedly asked members of his trial defense team whether he would have to register as a sex offender as a result of his pleas. *See, e.g.*, J.A. 89, 97, 100, 105, 124, 130-31. Technical Sergeant (TSgt) Danford, a defense paralegal, recalls Appellee asking him about sex offender registration "on two or three occasions" during telephone calls. J.A. 130-31. Capt Logan recalled that Appellee raised the issue of sex offender registration with him "a couple of times" during telephone conversations and believes Appellee asked him another time in person while they were preparing for the providence

inquiry. J.A. 124. During those conversations, Capt Logan remembered, Appellee told him, "I won't plead guilty if I have to register as a sex offender." *Id*. Capt Logan responded that he could not provide a definitive answer and referred Appellee to Mr. Connors. *Id*. Capt Logan characterized sex offender registration as "the key issue" for Appellee. J.A. 125.

Both Appellee and Mr. Connors agree that Appellee asked Mr. Connors whether he would have to register as a sex offender if he pleaded guilty to the indecent assault specifications. J.A. 89, 105. Appellee remembers that Mr. Connors answered that "he was not sure, but he did not think I had to due to the fact of he would see no reason with the allegations that were made that someone would have to register for that." J.A. 89. Appellee agreed that Mr. Connors never directly stated that Appellee would not have to register as a sex offender, but said, "I see no reason why you'd have to with these charges." J.A. 32. Appellee also recounted Mr. Connors' advice as "I don't see why it would be with the allegations that were brought against you, I don't see why that would be a registerable offense." J.A. 100. Appellee testified that Mr. Connors' statements gave him the impression that he would not have to register as a sex offender if he were to plead guilty to all charges and specifications. J.A. 90. "[T]he way he made it seem was I wouldn't have to by everything he was saying." J.A. 101.

Appellee explained that Mr. Connors' reaction made him think he might be overreacting to the possibility of registration, especially since, in Appellee's view, the individual who told him he might have to register was not credible. *Id*.

Appellee testified that he "probably brought it up to him two or three times and got the same answer every time." J.A. 100. One time when Appellee asked, Mr. Connors responded that he would find out. J.A. 101. Another time, Mr. Connors said "he saw no reason why." *Id*. Appellee explained that "[t]he only thing I understood was that from his--the way [Mr. Connor] looked at it, I would not have to. That's what I understood." J.A. 93.

"[I]n the end," Appellee testified, "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 to go ahead and sign the PTA.'" J.A. 93. Mr. Connors testified that had he known Appellee would have to register as a sex offender, "I wouldn't have advised him to plead guilty to those sex offense charges." J.A. 107. Mr. Connors explained that "we really didn't want to plead to those charges" because he thought they exaggerated the severity of Appellee's misconduct, which he considered "just foolery" with acquaintances. J.A. 108, 107. While he testified that he could not remember how he responded

to Appellee, Mr. Connors speculated that "at the time, my conclusion may have been it's not really a credible concern." J.A. 112.

Appellee testified, "If I'd have had to register, I definitely would not have pled guilty." J.A. 90. Appellee subsequently reiterated that had he known he would have to register as a sex offender if he pleaded guilty to the indecent assault specifications, he would not have done so. J.A. 91.

Appellee made similar remarks to Capt Logan before trial: "One thing [Appellee] made clear to me, and this is the one thing from the case that sticks out is he wasn't going to plead to the indecent assaults if he had to register as a sex offender, which is understandable." J.A. 121.

Appellee testified that following his conviction, confinement personnel advised him he would have to register as a sex offender and required him to sign sex offender registration paperwork under threat of withholding good-time credit. J.A. 90.

The *DuBay* military judge found as fact that based on the relative consistency of the *DuBay* witnesses' accounts "and from observing their demeanor on the stand and the way in which they answered the questions posed to them, all of the witnesses appeared to the court to be testifying truthfully and credibly to the best of their recollection." J.A. 164. Regarding

Appellee specifically, the *DuBay* military judge found as fact that "like all the witnesses, the court believes [Appellee] testified truthfully to the best of his recollection." *Id*.

Summary of Argument

Appellee's trial defense team provided ineffective assistance of counsel. His counsel's representation fell below an objective level of reasonableness. The civilian defense counsel's statements to Appellee would lead an objective listener to believe that Appellee would not have to register as a sex offender if he were to plead guilty to the indecent assault specifications. In fact, the opposite was true. But even if the civilian defense counsel's statements about registration did not constitute affirmative misadvice, the trial defense team still provided objectively deficient representation. Lawyers have a well-established ethical obligation to comply with clients' reasonable requests for information and to explain matters to the extent reasonably necessary for the client to make informed decisions. MODEL RULES OF PROF'L CONDUCT R. 1.4. Appellee's counsel violated those ethical requirements when they failed to provide him with accurate advice despite his many requests to determine whether pleading guilty to the indecent assault specifications would require him to register as a sex offender. The trial defense team's violation of those bedrock professional responsibility

obligations concerning an issue they knew was vitally important to their client fell below an objective standard of reasonableness.

Appellee was prejudiced by his counsel's deficient representation. There is a reasonable probability that had Appellee been properly advised, he would not have pleaded guilty to the indecent assault specifications. Appellee testified he would not have pleaded guilty to those specifications had he been properly advised and the military judge presiding over the *DuBay* hearing found Appellee's testimony appeared to be truthful and credible. Additionally, Appellee's former military defense counsel testified that Appellee told him at the time that he would not plead guilty if doing so would require him to register as a sex offender. Significantly, the civilian defense counsel testified that had he known Appellee would have to register as a sex offender if he pleaded guilty to the indecent assault specifications, he would not have recommended that Appellee plead guilty to those specifications. Accordingly, the key question is whether there is a reasonable probability that Appellee would have pleaded not guilty to the indecent assault specifications had he he known he would have to register as a sex offender as a result *and his civilian defense counsel advised him not to plead guilty to those specifications*. There is far more than a reasonable probability Appellee would not

have pleaded guilty under those circumstances. Accordingly, Appellee's counsel provided ineffective assistance of counsel and the Air Force Court was right to reverse the findings of guilty to the indecent assault specifications.

Argument

Appellee received ineffective assistance of counsel due to his civilian defense counsel's misleading advice concerning sex offender registration.

Appellee received constitutionally deficient representation. "Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 711 (1970)). Appellee's trial defense team failed to provide him with such assistance.

A. Standard of Review

"Issues involving ineffective assistance of counsel involve mixed questions of law and fact. This Court reviews factual findings under a clearly erroneous standard, but looks at the questions of deficient performance and prejudice de novo." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (internal citations omitted).

B. Law and Analysis

Military appellate courts analyze ineffective assistance of counsel claims under the test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Gutierrez*, 66 M.J. at 331. The first prong of this test asks "whether counsel's performance fell below an objective standard of reasonableness." *Id*. The second prong asks whether, if so, "but for the deficiency, the result would have been different." *Id*. An accused "has the burden of demonstrating both deficient performance and prejudice." *Id*.

Appellee's civilian defense counsel provided ineffective assistance of counsel. By providing him with objectively misleading advice concerning sex offender registration, he fell well below an objective standard of reasonableness. The second *Strickland* prong is satisfied because but for the inaccurate advice, there is a reasonable probability that Appellee would not have pleaded guilty to the indecent assault specifications.

1. Appellee's defense counsel's advice concerning sex offender registration fell below an objective standard of reasonableness

Contrary to the misleading advice that Appellee's civilian defense counsel provided, the indecent assault specifications to which he pleaded guilty would require him to register as a sex offender. As the Air Force Court explained in its original decision in Appellee's case:

> Federal registration requirements pertinent to [Appellee's] offenses are set forth in the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901 *et seq*. Specifically, 42 U.S.C. § 16913(a) provides that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides." The statute defines "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). "Sex offenses" include any "criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(5)(A)(i). "Sexual contact," though not defined within the body of SORNA, is elsewhere defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person." Crimes and Criminal Procedures, 18 U.S.C. § 2246(3). Within the context of this case, at least two of the three indecent assault offenses of which [Appellee] was found guilty meet this definition. In addition, SORNA also indicates that qualifying "criminal offenses" include those "specified by the Secretary of Defense [SECDEF] under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)...." 42 U.S.C. § 16911(6). The SECDEF has identified qualifying offenses in Department of Defense Instruction (DODI) 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (17 Jul 2001), and such offenses include indecent assault. DODI 1325.7, ¶¶ 6.18.5.1, 6.18.6.1, Enclosure 27.

J.A. 5.

Given that indecent assault is expressly designated as a registerable offense under the governing DOD Instruction, Appellee's counsel should have responded to his many queries by informing him that, yes, he would be subject to sex offender registration if he were to plead guilty to the indecent assault specifications. But instead of giving such advice, Appellee's

counsel provided advice that would lead a reasonable recipient to believe that he did not have to register.

The Government's brief argues that Appellee's offenses did not require registration under the law as it existed in 2005 in Florida or Alabama. Government's Brief at 25. But this argument is based on one non-existent state statute and an incomplete reading of a second state statute. In its analysis, the Government cites Ala. Code § 15-20A-5 (2005). Government's Brief at 26. But there is no 2005 version of Alabama Code § 15-20A-5; that statute was adopted in 2011. *See* 2011 Ala. Laws Act 2011-640. Its effective date was July 1, 2011. Ala. Code § 15-20A-5 (2011). The 2011 act repealed the previous Alabama sex offense registration statutes. One of those repealed provisions, § 13A-11-200 (which was in effect at the time of Appellee's court-martial), required any Alabama resident convicted in federal court of "any sexual abuse of any member of the same or the opposite sex or any attempt to commit" such an act to register. Ala. Code § 13A-11-200 (2005). Alabama law defines sexual abuse in the first degree as including "subject[ing] another person to sexual contact who is incapable of consent by reason of being physically helpless or mentally incapacitated." Ala. Code § 13A-6-66 (2011). (This portion of the statute was the same in 2005). Sexual contact under Alabama law includes contact with a woman's breasts for purposes of

sexual gratification. *See, e.g., Ex parte A.T.M.*, 804 So. 2d 171, 174 (Ala. 2000). According to the stipulation of fact, Appellee fondled and kissed Ms. N.D.B.'s breasts, despite her protestations, while she was in a blacked out state, apparently moving in and out of consciousness after an evening of drinking. *See* P.E. 1, ¶¶ 10-13, J.A. 44. Appellee did so, according to the stipulation, "with the intent to gratify his sexual desires." *Id.*, ¶ 13. Thus, according to the facts set out in the stipulation, he would be required to register as a sex offender under Alabama law. The Alabama Court of Criminal Appeals has also held that the crime of sexual abuse is established where the accused grabs a victim and then "grab[s] her between the legs in her genital area," *A.B.T. v. State*, 620 So. 2d 120 (Ala. Ct. Crim. App. 1992), which is similar to the stipulation of fact's description of Appellee's conduct with A1C T.M.G. *See* Prosecution Exhibit 1, ¶ 8, J.A. 43. Registration would thus be required for that reason as well.

So Appellee would have been required to register as a sex offender under Alabama law in 2005 and would be required to do so today. Alabama Code § 15-20A-5 (2011) requires sex offender registration of anyone convicted in federal court of a crime similar to 31 specified offenses, including violations of Ala. Code § 13A-6-66. *Id.* at (31), (3). As discussed above, at

least two of Appellee's convictions are for offenses similar to violations of Ala. Code § 13A-6-66.

Florida's sex offender registration statute provides that someone who moves to Florida must register as a sex offender if that person would be required to register as a sex offender in another state if the individual were a resident of that state. Fla. Stat. § 943.0435(1)(a)1.b (2011). A similar provision was in effect in 2005. *See* Fla. Stat. § 943.0435(1)(a)3 (2005). This provision would require Appellee to register in Florida if he were to move there, since he would be required to register as a sex offender in Illinois if he were a resident of that state.

Since 2002, Illinois law has specifically included convictions under the Uniform Code of Military Justice as registerable offenses. *See* 730 Ill. Comp. Stat. 150/2 (2011); 2001 Ill. Legis. Serv. P.A. 92-828. In both 2005 and today, Illinois law's definition of a sex offender for registration purposes included someone convicted of criminal sexual abuse or a substantially similar UCMJ offense. *See* 730 Ill. Comp. Stat. 150/2 (2005). Illinois law defines criminal sexual abuse as committing "an act of sexual conduct by the use of force or threat of force" and committing "an act of sexual conduct" knowing "that the victim is unable to understand the nature of the act or is unable to give knowing consent." 720 Ill. Comp. Stat. 5/11-1.50 (2011). Criminal sexual abuse had the same

definition under Illinois law in 2005. *See* 720 Ill. Comp. Stat. 12-15 (2005). Illinois case law defines "force" for sexual offenses purposes to include accomplishing sexual conduct by surprise. *See, e.g., People v. Borak*, 301 N.E.2d 1, 5 (Ill. App. Ct. 1973); *People v. Deenadayalu*, 772 N.E.2d 323 (Ill. App. Ct. 2002). In 2005, Illinois law defined "sexual conduct" as "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused for the purpose of sexual gratification or arousal of the victim or the accused." *People v. Wilson*, 824 N.E.2d 191, 197 (Ill. 2005) (quoting 720 Ill. Comp. Stat. 5/12-12(e) (West 2000)); *see also* 720 Ill. Comp. Stat. 5/11-0.1 (2011) (setting out similar definition of sexual conduct). The stipulation of fact in this case sets out surprise touching of one victim's sexual organ and the touching and kissing of another victim's breasts over her protestations while she was in a blacked out state due to intoxication. *See* P.E. 1, ¶¶ 6-13, J.A. 43-44. Convictions for those offenses would require Appellee to register as a sex offender in Illinois. And because he would be required to register as a sex offender if he were a resident of Illinois, Florida law in 2005 (and now) would require him to register as a sex offender upon moving to that state. *See* Fla. Stat. § 943.0435(1)(a)3 (2005). Thus, contrary to the Government's

argument, Appellee would have been subject to sex offender registration in Florida, Alabama, and Illinois. He would have been required to register in many other states (and the District of Columbia) as well. *See, e.g.*, Alaska Stat. § 12.63.100(6)(B) (2005); Cal. Penal Code § 290(a)(2)(A) (2005); D.C. Code § 22-4001(8)(A), (G) (2005); N.Y. Correct. § 168-a.2(a), (d) (McKinney 2005). Hence, Appellee's trial defense counsel's performance fell below an objective level of reasonableness when he was not advised that he would have to register and, on the contrary, received assurances that would lead a reasonable person to believe that he would not have to register.

By repeatedly misadvising Appellee concerning the law governing sex offender registration, his trial defense team fell well below an objectively reasonable level of representation.

As the Air Force Court observed, "Numerous federal courts have held that affirmative misrepresentations by counsel about significant collateral consequences of a conviction may constitute ineffective assistance of counsel." J.A. 179 (citing *United States v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005); *United States v. Cuoto*, 311 F.3d 179, 187-88, 191 (2d Cir. 2002)). Appellee received such affirmative misrepresentations from his counsel about a significant collateral consequence of his conviction.

There can be no question as to the significance of the sex offender registration collateral consequence, either as a general matter or to Appellee specifically. This Court has concluded that "the requirement of registering as a sex offender is a serious consequence of a conviction." *United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006). And Capt Logan testified that sex offender registration was "the key issue" for Appellee. J.A. 125. Appellee's civilian defense counsel misadvised him concerning that significant collateral consequence.

The court below concluded "that the advice affirmatively misrepresented the requirement for [Appellee] to register as a sex offender if he pled guilty to indecent assault." J.A. 180. The court explained:

> The statements of [Appellee's] civilian defense counsel clearly attempt to minimize the seriousness of the indecent assault charges and assure [Appellee] that he would not have to register as a sex offender. In his testimony at the *DuBay* hearing, Mr. NC, [Appellee's] civilian defense counsel, repeatedly used such phrases as "fairly innocuous" and "just foolery" to describe the sexual assault offenses. Mr. NC claimed lack of memory on many points but, in response to questions from the military judge, did recall concluding that sex offender registration was "not really a credible concern." Consistent with this testimony, [Appellee] testified that when he directly asked Mr. NC if sex offender registration would be required Mr. NC told him: "I don't see why it would be with the allegations that were brought against you. I don't see why that would be a registerable offense." The military judge at the *DuBay* hearing found

> [Appellee's] testimony regarding his interactions with civilian defense counsel credible.

J.A. 180.

The Air Force Court reasoned:

> The advice by [Appellee's] civilian defense counsel is analogous to that in *Kwan*, wherein the court found ineffective assistance of counsel based on faulty advice concerning deportation. In *Kwan*, the court found that counsel affirmatively misled his client when he "assured Kwan that although there was technically a possibility of deportation, '*it was not a serious possibility*.'" *Kwan*, 407 F.3d at 1008 (emphasis added).

Id.

The court pointed to the effect that the civilian defense counsel's words would have on a lay client:

> Uneducated in the ways of 'lawyer speak,' [Appellee] was not required to further ferret out and eliminate potential inconsistencies in his counsel's response, but was entitled to rely on the totality of the advice given to him by the professional lawyer representing him and whom he understandably expected to know the law.

J.A. 181 (quoting *Rose*, 67 M.J. at 634-35). The court refused to allow "this lawyer's misleading advice . . . to hide behind the fine print of equivocation when the totality of the advice clearly conveyed that [Appellee] would not have to register as a sex offender if he pled guilty." *Id*.

Appellee testified that "in the end," he placed the issue in his attorney's hands and asked Mr. Connors for his "best advice" about what he should do. J.A. 93. Mr. Connors replied

that he did not see any reason why Appellee would have to register and advised him to sign the pretrial agreement. *Id*. That response was not a failure to advise; it was misadvice. And that misadvice violates *Strickland*'s first prong. As the Air Force Court concluded, "Erroneous advice in this important area falls measurably below the level of performance reasonably expected of professional legal counsel." J.A. 181.

But even if the trial defense team's responses to Appellee's queries about sex offender registration did not rise to the level of misadvice, the trial defense team's failure to comply with Appellee's reasonable requests for information still offends *Strickland*'s deficient performance prong. This is not a case like *Miller*, where the topic of sex offender registration apparently never came up between the accused and his trial defense counsel and the issue was whether the trial defense counsel should have broached the topic with the accused. *See* 63 M.J. 452. Rather, in this case, Appellee repeatedly asked his counsel about sex offender registration and his counsel understood the significance of the issue to Appellee. Failing to provide advice in that context is objectively unreasonable.

An attorney practicing before an Air Force court-martial has an ethical obligation to "promptly comply with reasonable requests for information." AIR FORCE RULES OF PROF'L CONDUCT R. 1.4(a) [Appendix C]. Such an attorney is ethically required to

"explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id*. at R. 1.4(b). These provisions are identical to their counterparts in the ABA Model Rules of Professional Conduct, as well as their counterparts under the Rules of Professional Conduct in Illinois and Missouri, where Mr. Connors is licensed. R. at 4; *see* MODEL RULES OF PROF'L CONDUCT R. 1.4; ILL. RULES OF PROF'L CONDUCT R. 1.4; MO. RULES OF PROF'L CONDUCT R. 1.4. Appellee's trial defense team violated these ethical requirements when they failed to comply with Appellee's repeated requests to determine whether pleading guilty to the indecent assault specifications would require him to register as a sex offender. These violations are significant because in *Strickland* itself, the Supreme Court observed, "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable," though they are "only guides." *Strickland*, 455 U.S. at 688; *see also Padilla*, 130 S. Ct. at 1482. The violation of such bedrock ethical requirements concerning what Appellee's counsel knew was his "key issue," J.A. 125, falls well below an objective standard of reasonableness.

That conclusion is consistent with the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla*, the Court held that when a criminal conviction could result in the defendant's deportation, the defendant's counsel must provide advice concerning the risk of deportation. 130 S. Ct. at 1483. The Court rejected a distinction between "affirmative misadvice" and failure to advise. *Id*. at 1484. The Court reasoned that "[a] holding limited to affirmative misadvice would invite . . . absurd results." *Id*. Such a holding "would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Id*. (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)).

In *Padilla*, the Court held that when the deportation consequences of a conviction are clear, the defense counsel has a duty to give correct advice. *Id*. at 1483. Where "the law is not succinct and straightforward, . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id*. Extrapolating *Padilla* into this sex offender registration context, here, as the Air Force Court

concluded below, the law was clear: "Even cursory research would have disclosed that conviction of the indecent assaults carried a substantial risk that [Appellee] would have to register as a sex offender." J.A. 181. But even if the applicable law is not considered clear, the trial defense team failed to satisfy even the less rigorous standard. The trial defense team did not advise Appellee that pleading guilty to the indecent assault specifications carried a risk of sex offender registration. On the contrary, Mr. Connors repeatedly suggested that pleading guilty carried no such risk. Mr. Connors' approach to the question was so dismissive that Appellee thought his concern over the issue might be an overreaction, leading him to doubt the warning that a low-credibility source had provided to him about the risk of sex offender registration. J.A. 101. Thus, just as in *Padilla*, instead of informing themselves and providing accurate advice, Appellee's trial defense team provided "false assurances." *Padilla*, 130 S. Ct. at 1483.

Appellee's trial defense team thus fell below an objective level of reasonableness regardless of whether the civilian defense counsel's statements are considered misadvice. A reasonable defense counsel faced with Appellee's repeated queries about the issue would have informed himself about the law and provided accurate advice. That did not occur in this case.

2. Appellee was prejudiced by his counsel's deficient advice because there is a reasonable probability that had he been correctly advised, Appellee would not have pleaded guilty to the indecent assault specifications

Once it is determined that counsel's performance fell below the objective reasonableness standard, the next inquiry is whether Appellee was prejudiced. Prejudice will be found where "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). As this Court has explained, "The focus is not on the outcome of a potential trial, but on 'whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), *aff'd*, 556 U.S. 904 (2009).

That prejudice standard is satisfied here.

The record establishes that had the civilian defense counsel properly advised Appellee, the civilian defense counsel "wouldn't have advised him to plead guilty to those sex offense charges." J.A. 107. So the question for prejudice purposes is whether, had Appellee been correctly advised concerning the sex offender registration requirement, there is a reasonable probability that he would not have pleaded guilty to the indecent assault specifications *when his civilian defense*

counsel advised him not to. The record answers that question. Appellee explained that "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.'" J.A. 93. We know that had the civilian defense counsel provided Appellee with proper advice concerning the sex offender registration issue, he would have told Appellee that his best advice was not to plead guilty to the indecent assault specifications. J.A. 107.

The standard for determining prejudice in this context is whether "there is a reasonable probability that, but for counsel's errors, [Appellee] would not have pleaded guilty and would have insisted on going to trial." *Tippit*, 65 M.J. at 76. Had the civilian defense counsel advised Appellee not to plead guilty to the indecent assault specifications--as we know he would have had he properly advised Appellee concerning registration--there is far more than a "reasonable probability" that Appellee would not have pleaded guilty to the indecent assault specifications. Appellee decided to put the question in his attorney's hands. His attorney would have decided against pleading guilty. Accordingly, *Strickland*'s second prong is satisfied.

Even without considering how the civilian defense counsel would have advised Appellee, the record establishes a "reasonable probability" that Appellee would have pleaded not

guilty to the indecent assault specifications had he been properly advised. Appellee testified, under penalty of perjury, that "[i]f I'd have had to register, I definitely would not have pled guilty." J.A. 90. The *DuBay* military judge found as a matter of fact that she believed Appellee "testified truthfully to the best of his recollection." J.A. 164. She also found, based in part on demeanor while testifying and "the way in which they answered the questions posed to them," that all of the witnesses, including Appellee, "appeared to the court to be testifying truthfully and credibly to the best of their recollection." *Id*.

Appellee's credible testimony that he would not have pleaded guilty had he been properly advised is sufficient to meet the "reasonable probability" standard. But there is far more in the record than Appellee's own word to support that conclusion.

Capt Logan testified that sex offender registration was "the key issue" for Appellee. J.A. 125. Capt Logan explained that "[o]ne thing [Appellee] made clear to me, and this is the one thing from the case that sticks out is he wasn't going to plead to the indecent assaults if he had to register as a sex offender, which is understandable." J.A. 121. That statement corroborates Appellee's post-trial testimony that the registration issue would have been a deal breaker.

The credibility of Appellee's claim is further corroborated by testimony concerning the defense's reluctance to plead guilty to the indecent assault specifications. Mr. Connors testified that "we really didn't want to plead to those charges." J.A. 108. Appellee testified that he felt that there were facts or issues concerning the indecent assault specifications that could have been litigated at trial. J.A. 90. Capt Logan testified that he had told the Scott Air Force Base Chief of Justice that "we probably wouldn't be able to plead to that, that we may have to look at either dismissing, withdrawing those charges, or some other alternative." J.A. 121. That confirms that at the time of trial, the defense team, including Appellee himself, was reluctant to plead guilty to the indecent assault specifications. Given that reluctance, it is highly credible that the registration requirement would have been a deal breaker.

Ignoring the *DuBay* military judge's finding that Appellee appeared truthful and credible, one of the dissenting judges below disbelieved Appellee's testimony and reasoned that sex offender registration was not really a deal breaker for him since he never obtained a definitive answer and did not raise the issue with the military judge on the record when he could have done so. *See* J.A. 193-96 (Thompson, J., dissenting). But that overlooks Appellee's testimony during the *DuBay* hearing

suggesting that he stopped raising the issue because his civilian defense counsel's dismissive reaction convinced him he was overreacting to the possibility. *See* J.A. 101. This testimony rings true for several reasons. First, more than two years after the trial, the civilian defense counsel's attitude toward the registration issue still seemed dismissive at the *DuBay* hearing. *See* J.A. 30-31. Additionally, the civilian defense lawyer had been practicing since 1989--more than 15 years at the time Appellee was tried--including service as a judge advocate in the Marine Corps. J.A. 103-04. Appellee's military defense counsel was deferential to him. J.A. 164. A layperson such as Appellee would naturally assume that his civilian defense counsel had far more knowledge about registration requirements than he did. In short, the dismissive reaction from an apparently well-credentialed experienced professional would have made Appellee feel foolish if he continued to raise the issue. Unfortunately, Mr. Connors did not exercise the level of competence that would reasonably be expected of an ordinary counsel, much less a former judge advocate who had been practicing law for 15 years. As the majority below reasoned, it was the lawyer's responsibility to refrain from providing misleading advice, not Appellee's responsibility to sift through "lawyer speak" to determine the degree of wiggle room in his civilian defense counsel's

dismissive statements about the possibility Appellee would be required to register as a sex offender. J.A. 181 (quoting *Rose*, 67 M.J. at 634-35).

The Government also argues that the length of confinement, not any issue regarding sex offender registration, was "the controlling concern" that led Appellee to enter into the pretrial agreement. *See* Government Brief at 28-31. Of course a limitation on confinement was the factor that led Appellee to enter into the pretrial agreement; it was the only thing he received by entering into the pretrial agreement. *See* Appellate Exhibit V. Appellee's concern over sex offender registration was not a factor that would have led him to enter into a pretrial agreement; rather, it was a concern that would have *prevented* him from entering into a pretrial agreement. That potential impediment to entering the pretrial agreement having been resolved in his mind, Appellee then entered into the pretrial agreement to receive the protection of its confinement cap.

Adding the advice Mr. Connors would have given Appellee to plead not guilty to the indecent assault specifications to all of these other indicia that Appellee would not have pleaded guilty had he been properly advised results in more than a "reasonable probability" that the counsel's objectively deficient performance affected Appellee's pleas. Accordingly,

both prongs of the ineffective assistance of counsel analysis are satisfied.

Conclusion

For the foregoing reasons, this Honorable Court should affirm the Air Force Court's decision and return the record to the Judge Advocate General of the Air Force for further proceedings consistent with that opinion.

Respectfully submitted,

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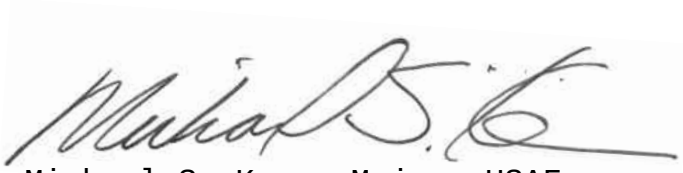

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November 14, 2011

Certificate of Compliance with Rule 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,953 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in monospaced typeface using Microsoft Word's Courier New font, size 12.

Dwight H. Sullivan
Attorney for Appellee
November 14, 2011

Appendix A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRANDON T. ROSE
United States Air Force

ACM 36508 (rem)

09 March 2011

Sentence adjudged 11 October 2005 by GCM convened at Scott Air Force Base, Illinois. Military Judge: David F. Brash (sitting alone) and Jennifer Whittier (*DuBay* hearing).

Approved sentence: Dishonorable discharge and confinement for 20 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Michael A. Burnat, Major John S. Fredland, Major Michael S. Kerr, Major Imelda L. Paredes, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, Major Jefferson E. McBride, Major Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

En banc

BRAND, ORR, GREGORY, ROAN and WEISS
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

GREGORY, Senior Judge:

In our en banc decision following the first remand of this case to reconsider the issue of ineffective assistance of counsel, a majority again found ineffective assistance of counsel and set aside the findings of guilty of specifications 1, 2, and 3 of Charge V. Understanding our authority upon the first remand as limited to those specifications in Charge V, we addressed the remaining charges and specifications by summarily referring to our earlier decision in which the findings on the remaining charges were affirmed. Our superior court has clarified that we should act on the remaining charges and the sentence. *United States v. Rose*, No. 09-5003/AF (C.A.A.F. 9 Nov 2010) (mem.)

Consistent with our initial decision, we dismiss specifications 1, 2, and 3 of Charge V and affirm the remaining findings of guilty. Based on our dismissal of the three indecent assault specifications, we next analyze the case to determine whether we can reassess the sentence. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *Id.* (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

For the remaining affirmed findings of guilty of multiple larcenies, attempted larceny, unlawful entry to commit larceny, forgery, obstruction of justice, drunk driving, and violation of a lawful order, the appellant still faced a maximum punishment of a dishonorable discharge and confinement for 26 years. Considering the evidence in the record, we are confident that the military judge would have imposed at least a dishonorable discharge and confinement for 17 months for these remaining offenses, and we reassess the sentence accordingly. This reassessed sentence is appropriate for the affirmed findings of guilty and purges the prejudicial error. *Sales*, 22 M.J. at 307-08; s*ee United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990) (appellate court must put itself "in the shoes" of the sentencing authority when reassessing the sentence).

Conclusion

Specifications 1, 2, and 3 of Charge V are dismissed. The remaining findings and sentence, as reassessed to a dishonorable discharge and confinement for 17 months, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant

occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

Judge Roan did not participate.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**ACM 36508 (rem)**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
Airman Basic (E-1)	**)**	
BRANDON T. ROSE,	**)**	
USAF,	**)**	
Appellant	**)**	***En Banc***

The Government's Motion for Reconsideration of our 9 March 2011 decision on remand is granted. Upon further consideration of the remand orders in this case, our 9 March 2011 decision appears to exceed the authorized scope of the remand order of 9 November 2010 by taking additional action on the findings regarding Specifications 1, 2, and 3 of Charge V.

Our initial decision in this case set aside the findings of guilty as to Specifications 1, 2, and 3 of Charge V, affirmed the remaining findings of guilty, set aside the sentence, and authorized a rehearing on Specifications 1, 2, and 3 of Charge V and the sentence. *United States v. Rose*, 67 M.J. 630 (A.F. Ct. Crim. App.), *rev'd*, 68 M.J. 236 (C.A.A.F. 2009) (mem.). Upon remand to reconsider our finding of ineffective assistance of counsel regarding Specifications 1, 2, and 3 of Charge V, we again found ineffective assistance of counsel and set aside the findings of guilty as to Specifications 1, 2, and 3 of Charge V. *United States v. Rose*, ACM 36508 (f rev) (A.F. Ct. Crim. App. 11 June 2010) (unpub. op.), *rev'd*, 69 M.J. 426 (C.A.A.F. 2010) (mem.). We noted that "we previously affirmed the findings of guilty as to the remaining charges and specifications but set aside the sentence and authorized a rehearing with respect to Specifications 1, 2, and 3 of Charge V and the sentence…" *Id.*

However, the case was again remanded for us to again expressly act on those remaining charges and specifications and the sentence. *Rose*, 69 M.J. at 426. On 9 March 2011, a newly constituted en banc panel affirmed the remaining findings of guilty and, in acting on the sentence, reassessed the sentence after dismissing Specifications 1, 2, and 3 of Charge V. *United States v. Rose*, ACM 36508 (rem) (A.F. Ct. Crim. App. 9 March 2011) (unpub. op.). Although dismissal of the affected specifications and reassessment of the sentence appeared to be in the best interest of both justice and judicial economy, it also appears, in light of reconsideration based on the briefs of the parties to exceed the scope of the second remand by taking additional action regarding Specifications 1, 2, and 3 of Charge V.

Accordingly, it is by the Court on this 15th day of August, 2011,

ORDERED:

Wherefore, consistent with our initial decision in this matter and within the parameters of the remand orders, the findings of guilty as to Specifications 1, 2, and 3 of Charge V having already been set aside, we affirm the remaining findings of guilty, set aside the sentence, and authorize a rehearing on Specifications 1, 2, and 3 of Charge V and the sentence.

Judges BRAND, ORR, GREGORY, and WEISS concur.

Judge ROAN did not participate.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court

Appendix C

Rule 1.3. DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. FEES

[Omitted as inapplicable to military practice.]

DISCUSSION

Air Force lawyers do not charge or collect fees. Civilian lawyers who do are regulated and may be sanctioned by state or federal bar authorities.

Rule 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) [Modified] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.

DISCUSSION

Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the United States Air Force. A lawyer's duty to a client is a strong one. If it is possible for the lawyer to act to prevent ongoing or potential criminal misconduct without violating a client confidence, those actions should always be considered first. In the circumstances described in the rule, a lawyer is excused from his fundamental obligation to preserve client confidences. See also Rule 1.13, Rule 5.4, and Standard 4-3.7.

Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.