23 February 2012

**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellant* | ) | APPELLANT'S BRIEF IN SUPPORT OF ISSUE PRESENTED |
| v. | ) | |
| | ) | USCA Misc. Dkt. No. 12-5001/AF |
| Senior Airman (E-4),<br>DANIEL J. DATAVS, USAF,<br>*Appellee.* | ) | Crim. App. Dkt. 37537 |

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**APPELLANT'S BRIEF IN SUPPORT OF ISSUE PRESENTED**

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**INDEX**

**TABLE OF AUTHORITIES**

**SUPREME COURT CASES**



**COURT OF APPEALS FOR THE ARMED FORCES**

**AIR FORCE COURT OF CRIMINAL APPEALS**



**FEDERAL CASES**



**MISCELLANEOUS**

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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 INCORRECTLY APPLIED THE STANDARD OF LAW UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND HARRINGTON V. RICHTER, 131 S.CT. 770 (2011), WHEN EVALUATING WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT SEEKING EXPERT ASSISTANCE DURING TRIAL AFTER THE GOVERNMENT'S EXPERT WITNESS TESTIFIED.**

## 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 5 May and 30 June to 2 July 2009, a panel of officer members sitting as a general court-martial convicted Appellee of one specification of false official statement in violation of Article 107, UCMJ, and one specification of forcible anal sodomy and one specification of forcible oral sodomy in violation of

Article 125, UCMJ. (J.A. at 32-33.) The panel sentenced Appellee to a dishonorable discharge, to forfeit all pay and allowances, and to be reduced to the grade of E-1. (J.A. at 34.) The convening authority approved the adjudged findings and sentence. (J.A. at 35.)

Appellee raised the following assignments of error:

I.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBTAIN AN EXPERT CONSULTANT IN THE FIELD OF SEXUAL ASSAULT EXAMINATIONS, FAILED TO MAKE CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS THAT WERE ALSO BASE VICTIM ADVOCATES, FAILED TO PREPARE THE NECESSARY FOUNDATION TO ADMIT TELEPHONE RECORDS FOR THE PURPOSE OF IMPEACHING THE COMPLAINING WITNESS, FAILED TO ARGUE MISTAKE OF FACT DURING FINDINGS ARGUMENT, AND FAILED TO PRESENT EVIDENCE IN SENTENCING REGARDING SEX OFFENDER REGISTRY REQUIREMENTS.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE RULED THAT DEFENSE COUNSEL WAS NOT ALLOWED TO ARGUE THROUGH REASONABLE INFERENCE AND COMMON KNOWLEDGE THE MITIGATION OF SEX OFFENDER REGISTRY.

III.

WHETHER THE CONVENING AUTHORITY VIOLATED THE RULES FOR COURTS-MARTIAL 1107(D)(2) WHEN HE AUTHORIZED TOTAL FORFEITURES OF PAY EVEN THOUGH APPELLANT RECEIVED NO CONFINEMENT.

IV.

WHETHER APPELLANT'S DISHONORABLE DISCHARGE WAS INAPPROPRIATELY SEVERE CONSIDERING THAT HE RECEIVED NO CONFINEMENT WHEN THE PANEL CONSIDERED ALL OF THE FACTS IN HIS CASE.

V.

WHETHER THE VIOLATION OF THE 18-MONTH POST-TRIAL PROCESSING STANDARD FOR COMPLETION OF THE FIRST LEVEL OF APPELLATE REVIEW WARRANTS RELIEF UNDER UNITED STATES V. TARDIFF, 57 M.J. 219 (C.A.A.F. 2002).[1]

On 9 November 2011, the Air Force Court of Criminal Appeals (AFCCA) issued a decision finding trial defense counsel's "failure to obtain expert assistance" after the government's expert sexual assault nurse examiner testified "fell measurably below the performance ordinarily expected of fallible lawyers;" however, the Court then determined Appellee could not demonstrate a reasonable probability that, absent the error, there would have been a different result. United States v. Datavs, ACM 37537 at 7-8 (A.F. Ct. Crim. App. 9 November 2011) (unpub. op.) (J.A. at 1-22.). After evaluating each of Appellee's assignments of error listed above, the Court affirmed the findings and modified the sentence to include a dishonorable discharge, forfeiture of $933.00 pay for two months, and reduction to E-1.[2] Id. at 14.

[1] This issue was submitted by Appellee in a supplemental assignment of error.
[2] The Court modified the approved sentence of forfeitures of pay to conform with R.C.M. 1107(d)(2), Discussion, and United States v. Warner, 25 M.J. 64 (C.M.A. 1987), by limiting Appellee's forfeitures to two-thirds of his pay for two months.

On 12 December 2011, the Air Force Court denied the government's Motion for Reconsideration En Banc. (J.A. at 23.) On 29 December 2011, Appellee filed an unopposed motion requesting this Court extend the deadline for the Judge Advocate General of the Air Force to certify an issue under Article 67(a)(2), UCMJ, until 10 February 2012. On 10 January 2012, this Court granted Appellee's request for an extension of time.

The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> **WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS INCORRECTLY APPLIED THE STANDARD OF LAW UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND HARRINGTON V. RICHTER, 131 S.CT. 770 (2011), WHEN EVALUATING WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT SEEKING EXPERT ASSISTANCE DURING TRIAL AFTER THE GOVERNMENT'S EXPERT WITNESS TESTIFIED.**

## Statement of Facts

Contrary to his pleas, Appellee was convicted by general court-martial for forcibly sodomizing a woman, S.F., both anally and orally, and for lying to law enforcement officials when being questioned about the allegation. (J.A. at 29-30; 32-33.) On or about 28 July 2008, Appellee had revealed to S.F. during a phone conversation that he had received deployment orders to Turkey, so she traveled to his house around 0200 hours to talk to him about his pending departure. (J.A. at 46-47, 76.) Appellee's roommates let S.F. into the house and she went to Appellee's room

where he was sleeping. (J.A. at 47-48.) S.F. woke up Appellee, they began kissing, and quickly progressed to consensual vaginal intercourse. (J.A. at 48-50.) Appellee and S.F. had previously engaged in consensual vaginal intercourse approximately one-to-two weeks earlier. (J.A. at 49.)

Appellee became surprisingly demanding, physically forcing S.F. to perform oral sex on him against her expressed desires. (J.A. at 50-52.) They then engaged in vaginal intercourse again. (J.A. at 52.) This time, however, S.F. testified that she was scared because Appellee was being so forceful, but she did not complain because she feared it would make him angrier. (J.A. at 52-53.) While engaging in vaginal intercourse the second time, Appellee slapped S.F. in the back because "she wasn't in the right position" and she started to experience physical pain caused by the sexual intercourse. (J.A. at 53.) Next, Appellee told S.F. that he wanted to have anal sex. (J.A. at 55.) Against S.F.'s repeated verbal objections, Appellee forcibly sodomized her. (J.A. at 55-58.) S.F. testified that she had "never felt that type of pain" while being anally sodomized. (J.A. at 57.) Appellee and S.F engaged in vaginal sex again, followed by S.F. performing oral sex on Appellee a second time.[3] (J.A. at 59-60.) Afterwards, Appellee and S.F. talked briefly, and she departed his house. (J.A. at 60-61.)

[3] Appellee was acquitted of the allegation of forcible oral sodomy on the second occasion.

The next day, S.F. revealed to her mother she had been raped. (J.A. at 63.) S.F.'s mother advised her to go to the hospital to have a sexual assault examination performed. (J.A. at 64.) At the hospital, a family acquaintance and sexual assault nurse examiner (SANE), T.B., conducted a forensic examination on S.F. (J.A. at 64-65.)

On 13 March 2009, trial defense counsel[4] submitted a "by-name" request to the convening authority seeking the appointment of a SANE, B.O., to consult with the defense in preparation for and during trial. (J.A. at 36-37.) The senior defense counsel had worked with B.O. on a previous court-martial and knew that she was a "thoroughly competent SANE." (J.A. at 239.) On 22 April 2009, the convening authority denied the request. (J.A. at 38.) On 24 April 2009, trial defense counsel filed a motion to compel the appointment of a SANE consultant with the military judge. (J.A. at 39-42.) In describing the defense's need for a SANE, trial defense counsel explained:

> An expert consultant SANE would assist the Defense in better understanding of the evidence obtained by the Government's SANE representative. An expert consultant may assist the Defense in court . . . [t]here is a reasonable probability that not ordering the appointment of such an expert would result in a fundamentally unfair trial . . . .

(J.A. at 42-42.)

[4] Appellee was represented by a senior defense counsel (SDC) and an area defense counsel (ADC).

In preparation for trial, trial defense counsel interviewed the government's SANE on three separate occasions and observed her detailed testimony during the Article 32 hearing. (J.A. at 226, 230.) The last interview of T.B. was an extensive interview that occurred approximately one week prior to trial and lasted three hours. (J.A. at 230.) During the interview, trial defense counsel discussed at length with T.B. her findings based on her vaginal and anal examination of S.F. (J.A. at 226-27.) T.B. consistently offered damaging testimony regarding the injuries S.F. sustained to her vagina,[5] but did not describe the injuries to her anus in the same light. (J.A. at 226-27, 230-31.) In fact, T.B. described the vaginal injuries sustained by S.F. as "some of the worst she had ever seen." (J.A. at 226.) As such, trial defense counsel believed it was important to limit testimony from T.B. regarding the nature and extent of S.F.'s vaginal injuries sustained during the vaginal intercourse and solely focus her testimony on the findings of her anal examination. (J.A. at 226-27, 230-31, 239-40, 242.)

On or about 5 May 2009, the defense withdrew its motion to compel the appointment of a SANE in exchange for the prosecution agreeing to restrict T.B.'s testimony only to the medical findings

[5] One charge and one specification of rape in violation of Article 120, UCMJ, was originally preferred against Appellee. (J.A. at 29.) This charge encompassed the vaginal intercourse with S.F. (Id.) On 2 March 2009, after the Article 32 hearing, this charge was withdrawn and dismissed during referral.

of S.F.'s anal examination.[6] (J.A. at 43-44, 226-27, 230-31, 239-40, 242.) The defense strived to limit T.B.'s testimony to show the injuries could have been caused by an accidental insertion of Appellee's penis into S.F.'s anus or through consensual sodomy. (J.A. at 184-92.) Because of the nature and extent of S.F.'s vaginal injuries, the defense was concerned the court members would conclude that Appellee was violent and used force throughout the entire sexual encounter, which would spill over and influence the members' findings regarding the charge for anal sodomy and serve as harmful aggravation evidence in sentencing. (J.A. at 226-27, 230-31, 239-40.) Trial defense counsel was comfortable going forward without assistance from a SANE because, by limiting this evidence, T.B.'s testimony was "insufficient, in and of itself, to suggest with any degree of certainty whether the sexual conduct between [Appellee] and [S.F.] was consensual or not." (J.A. at 240.) Furthermore, trial defense counsel sought to show that "anal trauma, such as noted by [T.B.], could have been caused by a single insertion, or even partial insertion, of a penis regardless of the use of force." (Id.)

During trial, between 30 June to 2 July 2009, T.B. described the injuries to S.F.'s anus as more severe than she previously had revealed in pre-trial interviews or during the Article 32 hearing.

[6] Trial convened on 5 May 2009, but was continued until 30 June 2009 because the military judge granted the prosecution's request for a continuance due to witness availability issues.

(J.A. at 134-83.) Consistent with the agreement between trial counsel and the defense, T.B. did not testify as to S.F.'s vaginal injuries. (Id.)

The defense did not renew its request in the middle of trial for the appointment of an expert SANE to assist in responding to T.B.'s testimony. Instead, trial defense counsel pressed forward with their defense strategy and elicited testimony from T.B. showing that her medical findings could not definitely demonstrate the injuries were caused by forceful, nonconsensual anal sex. (J.A. at 184-192.) In doing so, on cross-examination the defense elicited the following evidence from T.B.: (1) that much of the information she relied upon during direct examination did not account for key medical factors, such as whether or not the subjects of her prior examinations were experienced with anal sex and whether those subjects prepared their bodies for anal sex beforehand, (J.A. at 184-87); (2) that it was physically possible the injuries to S.F.'s anus could have occurred by "first-time anal entry," (J.A. at 187); that it was medically possible that the damage to S.F.'s anus could have been caused by a single insertion of Appellee's penis, (J.A. at 188); that it was medically possible, but unlikely the injuries to S.F.'s anus could have been caused by a partial insertion, (Id.); and that she could not conclusively determine whether the injuries were caused by consensual or nonconsensual sexual activity, (Id.).

The declarations from trial defense counsel explained they had serious concerns regarding renewing their request for the appointment of an expert SANE for the defense. Because renewing their request would likely cause further delay of the trial, the prosecutors would have accrued more time to conduct additional pretrial investigation, which increased the risk the prosecution would discover additional damaging evidence against Appellee. (J.A. at 231, 239.) During pretrial investigation, Appellee provided trial defense counsel with a list of character references. (Id.) The list included Appellee's previous girlfriend. (Id.) After interviewing her, trial defense counsel determined Appellee's ex-girlfriend possessed "significant information that would be negative for our case" if discovered by the prosecution. (Id.) Furthermore, the defense had discovered and interviewed the initial disclosure witness, S.F.'s former boyfriend, and confirmed she initially provided details consistent with her claims to law enforcement and her subsequent testimony during legal proceedings. (Id.) Finally, the defense was aware that their requested SANE's schedule would not have permitted them to return to trial quickly so the prospect of additional delay created a legitimate risk that the prosecution would discover this damaging evidence. (Id.)

The additional facts necessary for disposition of this case are described in the Argument section below.

## Summary of Argument

AFCCA erred in finding that trial defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. AFCCA failed to analyze counsel's performance in light of the Supreme Court's decision in Harrington v. Richter, 131 S.Ct. 770 (2011), and thus misapplied the correct standard of law in the context of whether a defense counsel is ineffective for not seeking expert assistance in preparation for and during trial. Richter is the most recent, on-point guidance from our highest court regarding the standard for evaluating the necessity of expert assistance under Strickland v. Washington, 466 U.S. 668 (1984). By applying the correct standard, this Honorable Court should find that: (1) trial defense counsel had a reasonable explanation for not requesting expert assistance from a SANE after the government's expert testified; (2) that counsel's level of advocacy was consistent with the performance ordinarily expected of fallible lawyers; and (3) that AFCCA erroneously viewed counsel's actions through the distortion of hindsight. If this Honorable Court determines trial defense counsel's performance was deficient and that AFCCA applied the correct standard of law, this Court should find there is no reasonable probability that, absent the error, there would have been a different result and affirm the conviction and modified sentence.

## Argument

**THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY INCORRECTLY APPLYING THE STANDARD OF LAW UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND HARRINGTON V. RICHTER, 131 S.CT. 770 (2011), WHEN EVALUATING WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT SEEKING EXPERT ASSISTANCE DURING TRIAL AFTER THE GOVERNMENT'S EXPERT WITNESS TESTIFIED.**

### *Standard of Review*

Claims of ineffective assistance of counsel are reviewed by this Court de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)).

### *Law and Analysis*

The Sixth Amendment guarantees Appellee the right to effective assistance of counsel. United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, this Court applies the standard set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and begins with the presumption that counsel provided competent representation. Gooch, 69 M.J. at 361 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)) (citations omitted).

This Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009). Where an appellant

"attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006)).

This Court applies a three-part test to determine whether the presumption has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors," there would have been a different result?

Id. at 362 (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

1. Trial defense counsel had a reasonable explanation for not requesting expert assistance from a SANE after the government's expert testified.

This Court's analysis of counsel's performance is highly deferential and should consider counsel's conduct under the strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. Mazza, 67 M.J. at 474-75 (citing Strickland, 466 U.S. at 689 (internal citation omitted)). "[Appellee] must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

The Strickland standard is a general one, so the range of reasonable applications is substantial. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Strickland permits counsel to make a reasonable decision that makes particular investigations unnecessary. Id. There are countless ways for counsel to provide effective assistance in any given case; even the best criminal defense attorneys would not defend a particular client in the same way. Id. at 788-89. It is the rare situation whereby "the wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. at 789. There is a strong presumption that defense counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Id. at 790 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

The Supreme Court's unanimous decision[7] in Richter applying the Strickland standard in the context of whether or not a defense counsel is required to secure expert assistance in preparation for and in execution of his or her defense strategy undoubtedly reaffirmed the high bar an appellant must overcome to establish his counsel's representation was deficient for electing not to seek expert assistance. In Richter, the Supreme Court determined

[7] Justice Kagan took no part in the consideration or decision of the case.

that the defense counsel had wide latitude in developing and executing his defense strategy, which reasonably excluded consultation with a blood expert even though the expert's insight may have been useful. Id. at 788-92. Even if expert blood testimony could have supported Richter's defense, the Court determined it would be reasonable to conclude that a competent attorney might elect not to use such an expert. Id. at 789. The Court reasoned that Richter's defense counsel employed objectively reasonable strategic considerations in presenting the defense's theory of the case and held that counsel's overall performance was not deficient. Id. at 788-91.

This Court and the lower service courts have similarly not found ineffective assistance of counsel when a counsel foregoes potentially favorable information if the decision to do so was a strategic or tactical one. Gooch, 69 M.J. at 362-63 (not ineffective assistance of counsel to not have the military judge dismiss a specification and risk a mistrial because counsel had strategic reasons for keeping the assembled panel); Mazza, 67 M.J. at 475 (not ineffective assistance of counsel for counsel to elicit information on percentage of false child abuse allegations from government expert where strategy at trial was to claim allegation was false); United States v. Stevenson, 33 M.J. 79, 80 (C.M.A. 1991) (not ineffective assistance of counsel to decline to call requested character witness in sentencing since existence of

harmful rebuttal evidence was a reasonable basis for not presenting favorable evidence); United States v. Streete, ACM 36757, unpub. op. at 18 (A.F. Ct. Crim. App. 2 September 2009) (not ineffective assistance of counsel to not file a severance motion where counsel found a witness with damaging information not located by the government and knew severance would make the government reinvestigate the older charge); United States v. Colvano, ACM 37121, unpub. op. at 6-7 (A.F. Ct. Crim. App. 17 March 2009) (not ineffective assistance of counsel to decline to introduce mental health information as mitigation in sentencing where the reason was to prevent government access to damaging information in records).

AFCCA failed to analyze this case in light of Richter and thus misapplied the correct standard of law in the context of whether a defense counsel is ineffective for not seeking expert assistance in preparation for and during trial.[8] Richter is the most recent, on-point guidance from our highest court regarding the standard for evaluating ineffective assistance of counsel claims regarding the necessity of expert assistance.[9] It was

[8] AFCCA's decision did not cite, nor articulate an analysis illustrating a similar application of the Supreme Court's reasoning in Richter. In fact, the dissenting opinion cited and relied on the *overturned* Ninth Circuit Court of Appeals case, Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (case name changed between Circuit Court of Appeals and the Supreme Court), to support its rationale.

[9] The Supreme Court has subsequently reinforced that Richter establishes the correct legal analysis to be applied when evaluating ineffective assistance of counsel claims involving the necessity to seek expert assistance. In Allison v. Diaz, 132 S.Ct. 75 (2011) (summary disposition) *overturning* Diaz v. Clark,

error for AFCCA to ignore the precepts of Richter. If AFCCA would have correctly applied the legal standard, the Court could not have determined that trial defense counsel's advocacy fell measurably below the performance expected of reasonably fallible lawyers.

Here, trial defense counsel had developed a viable alternative theory of the case, i.e., that "S.F. was angry and felt jilted by [Appellee] and the allegation of sodomy was an attempt to seek revenge as Appellant made no attempt to plan for a long distance relationship in light of his impending deployment to Turkey." (J.A. at 230.) As such, the defense formulated a reasonable strategy to illustrate their theory and effectively executed that strategy given the circumstances of the case. Trial defense counsel reasonably and rightfully decided not to transform this case into a battle of the experts. Instead, the defense strived to show through the government's SANE that S.F.'s anal injuries could have been caused by very slight and brief penile penetration, and emphasized that the government's expert could not determine whether S.F.'s anal injuries were caused by consensual or nonconsensual sexual activity. (J.A. at 184-92.) Therefore,

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405 Fed. Appx. 123 (9th Cir.), the Supreme Court granted certiorari, vacated the lower court's judgment, and remanded the case for further consideration in light of Richter where a defense counsel decided to forego investigation into DNA evidence in a rape prosecution. The Ninth Circuit's opinion in Diaz was published on 29 November 2010, approximately six weeks before the Supreme Court announced its decision in Richter. Unlike the lower Court in this case, the Ninth Circuit did not have the benefit of Richter when reaching its conclusion in Diaz.

this evidence tended to support that S.F. consented to anal intercourse or that Appellee may have mistakenly believed she was consenting in conjunction with the other evidence introduced at trial.[10]

The evidence demonstrates that trial defense counsel did not need to abandon their deliberately designed trial strategy after the government's expert testified because they had a reasonable explanation for not requesting expert assistance -- they had already elicited the evidence needed from the government's own expert to cast suspicion on the government's theory of the case. "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert and opposite expert from the defense." Richter, 131 S.Ct. at 791. Simply put, there was no foreseeable benefit for the defense to delay trial to consult with a SANE when they were already prepared to use the government's expert's testimony to Appellee's advantage.

Furthermore, trial defense counsel encountered additional strategic considerations in evaluating whether to seek assistance from an expert SANE. The defense appropriately weighed the dangers of delay against the minimal gains to be achieved by seeking expert assistance from a SANE. As explained in

[10] The government notes that the defense's theory was not to allege that anal intercourse did not occur. If this were the case, it would be foreseeable that an expert SANE could be helpful for the defense to refute T.B.'s medical testimony.

their declarations, trial defense counsel had discovered additional damaging evidence to Appellee's case, which barely exceeded the wingspan of the prosecution's pretrial investigation. (J.A. at 231.) The defense learned that Appellee's ex-girlfriend, who had not been interviewed by the prosecution, possessed "significant information that would be negative for [Appellee's] case." (Id.) The defense had also identified and interviewed S.F.'s former boyfriend and confirmed she had initially disclosed that she was sexually assaulted to her ex-boyfriend. (Id.) The details S.F. provided to her ex-boyfriend were consistent with her claims to law enforcement and her subsequent testimony during legal proceedings. (Id.) Finally, the defense learned that their requested SANE's limited availability would not have permitted them to return to trial quickly so the prospect of additional delay created a legitimate risk that the prosecution would discover the foregoing damaging evidence.[11] (Id.) AFCCA erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Richter, 131 S.Ct. at 790.

[11] The dissent in Datavs, slip op. at 16, mistakenly noted "defense counsels' explanation for not wanting to delay the case in order to prevent the prosecution from having additional time to find the two unfavorable witnesses fell flat when the military judge granted the government a two-month delay." Trial was delayed by the military judge as requested by the prosecution in May 2009 and trial didn't resume until 30 June 2009. The dissent's reasoning ignores that if trial defense counsel were to stop trial in July 2009 after T.B. testified to consult with an expert, as the majority's opinion found counsel should have done, trial defense counsel's requested expert SANE, B.O., was not available at that time, which would have likely caused a second delay of trial. This additional delay would have unnecessarily exposed Appellee to the risk that the government would investigate the charges further and discover more damaging evidence. This was a risk defense counsel reasonably wanted to avoid.

For these reasons, trial defense counsel's representation was not deficient because they had a reasonable explanation for not seeking the assistance of an expert SANE after the government's expert testified and, therefore, provided Appellee effective assistance.

2. Trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

Trial defense counsel effectively executed their trial strategy despite the unexpected -- but inconsequential -- testimony provided by the government's expert. "While in some instances even an isolated error can support an ineffective assistance of counsel claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Richter, 131 S.Ct. at 791. Here, trial defense counsel's overall performance demonstrated capable and competent advocacy providing Appellee his best chance at establishing reasonable doubt.

Trial defense counsel is not required to be prepared for "any contingency" that may emerge at trial. Id. at 791. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Id. In this

case, trial defense counsel had conducted significant pretrial investigation to design the most effective trial tactics to achieve their overall defense strategy. For example, the defense conducted extensive interviews on multiple occasions to determine the best approach to cross-examine the government's SANE. (J.A. at 226, 230.) Even though trial defense counsel did not possess "formal or informal training regarding forensic evidence collection from a complainant after an allegation of sexual assault," Datavs, slip. op. at 3, their thorough pretrial investigation offset any lack of expertise. As stated in Maj J.O.'s supplemental declaration, he had experience in these matters because he had worked with a SANE, B.O., in a previous court-martial. (J.A. at 239.)

This case is a far cry from Rompilla v. Beard, 545 U.S. 374 (2005), finding counsel ineffective for inadequate pretrial preparation. The Supreme Court found Rompilla's counsel ineffective because they were on notice of harmful aggravation evidence the prosecution intended to present, but failed to investigate that easily accessible evidence.[12] Unlike Rompilla, trial defense counsel had thoroughly investigated this case and were prepared to counter the government's SANE despite not being

[12] Although Rompilla analyzed an ineffective assistance of counsel claim involving sentencing evidence in a capital litigation context, its analysis should apply to counsel's duty to investigate evidence for a prosecution's findings case as well.

forensic experts in sexual assault examinations and after being confronted with changes in her testimony.

When evaluating trial defense counsel's overall performance, it is abundantly clear that Appellee's counsel were effective advocates. First, trial defense counsel withdrew their motion for an expert SANE after careful determination that such a course was in Appellee's best interest. (J.A. at 43-44, 226-27, 230-31, 239-40, 242.) Counsel had a reasonable basis to be concerned that T.B.'s testimony concerning S.F.'s vaginal injuries would spill over to the anal sodomy specification during findings and any potential sentencing proceeding.

Furthermore, trial defense counsel effectively presented their theory of the case at nearly every step of litigation. The defense confronted S.F. with thorough and effective cross-examination questions to expose several inconsistencies in her previous statements compared to her in-court testimony. (J.A. at 276-336.) Trial defense counsel highlighted these inconsistencies during closing argument to undermine the credibility of S.F.'s allegations. (J.A. at 200-224.)

The evidence shows the defense was prepared to cross-examine T.B., was familiar with the subject matter, and knew the precise points they intended to extract from her to establish their theory of the case. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation."

Richter, 131 S.Ct. at 791. AFCCA erred in finding that trial defense counsel was unprepared to cross-examine T.B. when the record demonstrates the defense's cross-examination exposed highly probative points, such as: (1) that much of the information T.B. relied upon did not account for key medical factors, such as whether or not the subjects of her prior examinations were experienced with anal sex and whether those subjects prepared their bodies for anal sex beforehand, (J.A. at 184-87); (2) that it was physically possible the injuries to S.F.'s anus could have occurred by "first-time anal entry," (J.A. at 187); (3) that it was medically possible that the damage to S.F.'s anus could have been caused by a single insertion of Appellee's penis, (J.A. at 188); (4) that it was medically possible, but unlikely the injuries to S.F.'s injuries could have been caused by a partial insertion, (Id.); (5) and that she could not conclusively determine whether the injuries were caused by consensual or nonconsensual sexual activity, (Id.). The defense successfully elicited favorable evidence from T.B. to support Appellee's defense. More importantly, the defense was able to expose this evidence through an adverse expert witness, inherently bolstering the credibility of the evidence because it was extracted from the opposing party.[13]

[13] This litigation strategy is consistent with the sponsorship theory of litigation. *See* KLONOFF & COLBY, Winning Jury Trials: Trial Tactics and Sponsorship Strategies (NITA 3d ed., 2007); KLONOFF & COLBY, Winning Jury Trials:

Moreover, trial defense counsel's questioning of Detective Pitcock helped to portray Appellee as a cooperative subject, revealed that Appellee and S.F. had engaged in consensual sexual intercourse on two occasions prior to the incident in question, and highlighted admissions by Appellee indicating the anal intercourse was very brief. (J.A. at 193-94.) During the defense's case, Appellee's roommate was called to explain that S.F. was very flirtatious with Appellee, had an emotional demeanor when she arrived the night in question, and despite resting approximately forty-feet from Appellee's room, he did not hear anything through the thin walls to indicate S.F. was being sexually assaulted that night. (J.A. at 195-199.)

All of the evidence elicited by the defense demonstrates that counsel represented Appellee with vigor and conducted skillful cross-examinations. As noted, trial defense counsel elicited concessions from the government's expert and was able to draw attention to weaknesses in her conclusions and get her to admit the medical examination could not determine whether the injuries to S.F.'s anus resulted from consensual or nonconsensual sex. Based on these significant concessions, defense counsel had no reason to renew their request for the appointment of an expert SANE. As such, AFCCA erred in finding that trial defense

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Trial Tactics and Sponsorship Strategies (Lexis Nexis 2d ed. 2002); Sponsorship Strategy: A Reply to Floyd Abrams and Professor Saks, 52 Md. L. Rev. 458 (1993).

counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers.

3. AFCCA erroneously viewed trial defense counsel's actions through the distortion of hindsight.

"[An appellate court's] analysis of counsel's performance is highly deferential; it is not to assess counsel's actions through the distortion of hindsight; rather [it is] to consider counsel's actions in light of the circumstances of the trial . . . ." Mazza, 67 M.J. at 474 (citing Strickland, 466 U.S. at 689); *see also* Perez, 64 M.J. at 243; United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000). Under the Strickland standard for evaluating ineffective assistance of counsel claims, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Bell v. Cone, 535 U.S. 685, 698 (2002) (citing Strickland, 466 U.S. at 689).

AFCCA's decision erroneously reconstructed trial defense counsel's decisions through the distortion of hindsight. AFCCA's skewed view of counsel's performance resulted from its reliance on a post-trial report offered by B.O.[14] as part of Appellee's petition for clemency. (J.A. at 244-47.) B.O. was hired by Appellee's family after the court-martial had adjourned to

[14] The same expert SANE originally requested by trial defense counsel.

criticize T.B.'s testimony by reviewing the record of trial. (Id.) The report essentially constitutes an unchallenged opinion, which was not sworn to or affirmed, nor subject to cross-examination. (Id.) Such post-trial retrospection is exactly what Strickland proscribes and AFCCA's reliance upon such impermissible hindsight constitutes legal error.

Although B.O.'s report should not have been considered by AFCCA, her substantive findings do little to change Appellee's case. B.O.'s findings primarily highlighted minor points, which would not have impacted the weight of T.B.'s testimony. For example, B.O.'s report essentially disputes minor medical findings[15] and the particular use of medical terms,[16] and requests to review certain literature T.B. relied upon before expressing an opinion as to certain aspects of T.B.'s testimony.[17] (Id.) This report does not significantly undermine T.B.'s testimony. In fact, even though the report criticized certain aspects of T.B.'s testimony, three key consistencies exist between their opinions:

[15] B.O. repeatedly disputes spontaneous or immediate dilation of S.F.'s anus, (notes corresponding to pages 318, 319, 322, 327); B.O. contends that S.F.'s sphincter could open slightly given her physical position of the examination, (notes corresponding to pages 319, 322, 331); B.O. does not observe "active oozing" at 7 o'clock, (notes corresponding to page 326); B.O. is suspicious of the number of bottoms T.B. has examined in her career, (notes corresponding to page 336); and B.O. contests the difference in assessing rectal tone compared to anal dilation, (notes corresponding to page 338). (J.A. at 244-247.)

[16] B.O. disputes T.B.'s use of the term "colon," (notes corresponding to page 325). (Id.)

[17] B.O. requests to review the "records of the live models that [T.B.] states she has seen, (notes corresponding to page 334); and B.O. requests to review the literature T.B. relies upon to describe what is normal or abnormal with regard to consensual or non-consensual anal sex, (notes corresponding to page 345). (Id.)

(1) there was injury to S.F.'s anus; (2) some force was necessary to perform anal sex; and (3) S.F.'s injuries could have occurred from either consensual or non-consensual anal sex. The end result is that B.O. and T.B. reached the same medical conclusion regarding consent -- S.F.'s injuries could have been caused by consensual or nonconsensual sexual activity. There was simply no need for trial defense counsel to switch horses midstream and pit expert-against-expert to ultimately achieve the same conclusion. As recognized in Richter, "[a]n attorney need not pursue an investigation that would be fruitless . . . ." 131 S.Ct. at 790. Here, consultation with an expert SANE would have been a fruitless endeavor. Therefore, AFCCA should not have considered B.O.'s report when evaluating Appellee's ineffective assistance of counsel claim because it caused the Court to engage in improper retrospection.

4. If this Court finds trial defense counsel was ineffective and that AFCCA correctly applied the standard of law, no reasonable probability exists that, absent the error, a different result would have occurred.

Even if trial defense counsel would have renewed their request for the appointment of an expert SANE consultant, no reasonable probability exists that the result of trial would have been different. As such, AFCCA correctly determined that trial defense counsel's alleged deficiency did not prejudice Appellee.[18]

[18] Appellate courts are not required to apply the test for ineffective assistance of counsel in any particular order. United States v. Gutierrez, 66

The outcome of this case rested on the believability of S.F., Detective Pitcock, and Appellee's written statement to law enforcement. (J.A. at 248-53.) Furthermore, T.B.'s testimony is primarily relevant to the specification for forcible anal sodomy. Appellee was convicted of false official statement and forcible oral sodomy independent of T.B.'s medical testimony. The fact that Appellee achieved an acquittal on the forcible oral sodomy charge and was not sentenced to a single day of confinement after being convicted of a serious sex offense demonstrates his defense counsel provided competent and capable advocacy. (J.A. at 32-34.)

Most notably, however, is that an expert SANE for the defense would not have enabled Appellee to undermine T.B.'s testimony. The defense successfully elicited from T.B. that the medical examination could not confirm whether the injuries to S.F.'s anus were caused by consensual or nonconsensual sex. (J.A. at 184-92.) Even if the defense would have delayed trial to have B.O. testify, she would not have been able to offer a definitive opinion on the

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M.J. 329, 331 (C.A.A.F. 2008) (citing United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004)); United States v. Grigoruk, 56 M.J. 304 (C.A.A.F. 2002). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, *that course should be followed*." Gutierrez, 66 M.J. at 331 (quoting Strickland, 466 U.S. at 697) (emphasis added). The second prong of Strickland is critical, "[i]f [appellate courts] conclude that any error would not have been prejudicial under the second prong of Strickland, [they] need not ascertain the validity of the allegations or grade the quality of counsel's performance under the first prong." United States v. Saintaude, 61 M.J. 175, 179-80 (C.A.A.F. 2005). As demonstrated above, trial defense counsel were not deficient in light of the Supreme Court's rulings in Richter and Strickland. Even so, AFCCA unnecessarily graded the quality of trial defense counsels' performance when it had determined that any error would not have prejudiced Appellant. AFCCA should have simply analyzed this issue under the prejudice-prong of Strickland. Gutierrez, 66 M.J. at 331.

issue of consent, just as T.B. could not offer such a definitive opinion. Essentially, if B.O., or any other expert SANE would have testified, a reasonable fact-finder could have concluded that the expert testimony provided by both parties was indeterminate of consent. Whether anal intercourse occurred was not a matter in controversy. This information came directly from S.F. and Appellee. Whether the anal intercourse was consensual was in controversy and T.B. and B.O. could not provide conclusive evidence that S.F.'s injuries resulted from nonconsensual sexual activity. Given the fact that it is generally undisputed that some amount of force was necessary to engage in anal sex and that S.F.'s injuries could have resulted from either consensual or nonconsensual anal intercourse, this Court should not find a reasonable probability exists that an expert SANE for the defense would have lead to a different result. Therefore, Appellee suffered no prejudice and this Court should affirm the conviction and modified sentence.

## Conclusion

For the foregoing reasons, the United States respectfully requests this Court find that trial defense counsel's level of advocacy was consistent with the performance ordinarily expected of reasonably fallible lawyers and affirm the conviction and modified sentence.

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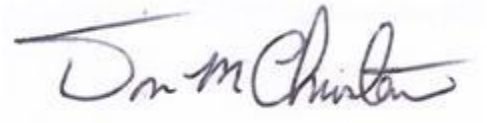

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 23 February 2012.

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