IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	Crim.App. Dkt. No. 20100084
Private (E-1) **CASSANDRA M. RILEY** United States Army, Appellant	**USCA Dkt. No. 11-0675/AR**

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WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER DEFENSE COUNSEL FAILED TO INFORM HER THAT SHE WOULD HAVE TO REGISTER AS A SEX OFFENDER AFTER PLEADING GUILTY.

WHETHER, IN LIGHT OF *UNITED STATES v. MILLER*, 63 M.J. 452 (C.A.A.F. 2006), THERE IS A SUBSTANTIAL BASIS TO QUESTION APPELLANT'S GUILTY PLEA DUE TO THE MILITARY JUDGE'S FAILURE TO INQUIRE IF TRIAL DEFENSE COUNSEL INFORMED APPELLANT THAT THE OFFENSE TO WHICH SHE PLEADED GUILTY WOULD REQUIRE APPELLANT TO REGISTER AS A SEX OFFENDER.

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Private (E-1) **CASSANDRA M. RILEY,** United States Army, Appellant	)	USCA Dkt. No.11-0675/AR

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

Granted Issues

I. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER DEFENSE COUNSEL FAILED TO INFORM HER THAT SHE WOULD HAVE TO REGISTER AS A SEX OFFENDER AFTER PLEADING GUILTY.

II. WHETHER, IN LIGHT OF UNITED STATES v. MILLER, 63 M.J. 452 (C.A.A.F. 2006), THERE IS A SUBSTANTIAL BASIS TO QUESTION APPELLANT'S GUILTY PLEA DUE TO THE MILITARY JUDGE'S FAILURE TO INQUIRE IF TRIAL DEFENSE COUNSEL INFORMED APPELLANT THAT THE OFFENSE TO WHICH SHE PLEADED GUILTY WOULD REQUIRE APPELLANT TO REGISTER AS A SEX OFFENDER.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal

[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).

Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, pursuant to her pleas,[3] of one specification of kidnapping in violation of Article 134.[4] A panel of officer members sentenced appellant to forfeit all pay and allowances, be confined for five years, and be dishonorably discharged.[5] The convening authority approved the adjudged sentence and credited appellant with 187 days of confinement against her sentence of confinement.[6]

On December 17, 2010 appellant filed a brief with the Army Court alleging no assignments of error. On July 7, 2011 the Army Court summarily affirmed the findings of guilty and sentence.[7] On August 18, 2011 appellant filed a motion to the Army Court for reconsideration that was denied on August 19, 2011. On November 15, 2011 this Court granted appellant's petition to review and set aside the Army Court's previous

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[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] JA 59.
[4] UCMJ, Art. 134, 10 U.S.C. § 934.
[5] JA 62.
[6] JA 15, Action.
[7] JA 8.

decision.[8] This Court remanded the case back to the Army Court and ordered it to obtain affidavits from appellant's trial defense counsel regarding appellant's allegation of ineffective assistance of counsel.[9] On May 11, 2012, after briefing by both parties, the Army Court again affirmed the findings and sentence.[10] On October 15, 2012 this Court granted appellant's petition for grant of review on two issues.

Statement of Facts

Appellant was on involuntary excess leave following a previous court-martial conviction.[11] Appellant had previously told family and friends that she was pregnant.[12] On July 27, 2009, appellant changed into hospital scrubs and entered the baby ward of Darnall Army Medical Center on Fort Hood, Texas.[13] Appellant entered the maternity room of a new mother, CPT MB, and her baby, and feigned being an attending nurse.[14] When the mother went to use the restroom, appellant took the baby out of the room without the mother's permission or knowledge.[15] When CPT MB returned from the restroom, she realized that her baby was gone and she began to search for him. When CPT MB went

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[8] JA 6-7.
[9] JA 6-7.
[10] JA 1-5.
[11] JA 2.
[12] JA 33-43.
[13] JA 33-43.
[14] JA 33-43.
[15] JA 54.

outside to the hallway she saw appellant trying to place her baby in a backpack.[16] CPT MB confronted appellant about her actions, and appellant gave the baby back and left the area.[17] The baby was visibly distressed and spitting-up when his mother regained custody.[18]

Five days later, appellant was apprehended and admitted to kidnapping the baby from the hospital room.[19] Her admission included the fact that she was faking a pregnancy and misleading her boyfriend and others into believing that she had recently given birth.[20] In addition, a search of her vehicle revealed medical scrubs and a plethora of baby paraphernalia although appellant had no children and did not work at the hospital.[21]

Appellant was charged with one specification of kidnapping a child. Prior to trial, appellant instructed her defense counsel to negotiate a plea agreement limiting her maximum confinement period which was life without parole.[22] Appellant's defense counsel never discussed the collateral consequence of sex offender registration or that a conviction for kidnapping a child includes the requirement to register as a sex offender.[23]

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[16] JA 49 (Stipulation of Fact).
[17] JA 33-43.
[18] JA 49.
[19] JA 33-43.
[20] JA 33-43.
[21] JA 33-43.
[22] JA 21-27.
[23] JA 21-27.

GRANTED ISSUES AND ARGUMENT

I. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER DEFENSE COUNSEL FAILED TO INFORM HER THAT SHE WOULD HAVE TO REGISTER AS A SEX OFFENDER AFTER PLEADING GUILTY.

Summary of Argument

Appellant fails to show that she was prejudiced by her defense counsel's alleged deficient representation. Appellant does not prove with reasonable probability that, absent defense counsel's alleged error, she would have pled not guilty and elected a contested court-martial. In light of the overwhelming evidence that the government possessed, her stated desire to plead guilty in order to limit her confinement exposure, and appellant's admission that a contested court-martial would have likely ended in a conviction, it is objectively unreasonable for someone in her position to change her plea. Any rational accused would have realized the overwhelming likelihood of conviction along with the inevitability of sex offender registration, and focused on limiting her confinement exposure, just like appellant did.

Standard of Review

A claim of ineffective assistance of counsel "is a mixed question of law and fact."[24] While "factual findings are reviewed under a clearly-erroneous standard", the ultimate question as to "whether counsel were ineffective and whether their errors were prejudicial are reviewed *de novo*."[25]

Law and Analysis

In *Strickland v. Washington*, the Supreme Court set forth the two pronged test that appellant must satisfy to establish ineffective assistance of counsel. First, appellant must show that her counsel's performance was constitutionally deficient.[26] Second, appellant must prove that the deficient performance prejudiced appellant, such that appellant was denied a fair trial.[27]

The test for prejudice is objective.[28] When measuring prejudice in the context of a guilty plea, appellant "must show that there is a reasonable probability that but for counsel's

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[24] *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001).
[25] *Id.*
[26] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
[27] *Id.* at 694 (the second prong requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").
[28] *Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (*Hill*'s prejudice prong is objective); *United States v. Curry*, 494 F.3d 1124, 1131 (D.C. Cir. 2007); *Richardson v. United States*, 379 F.3d 485, 488-89 (7th Cir. 2004); *United States v. Vargaspuentes*, 70 M.J. 501, 504 (Army Ct. Crim. App. 2011) (applying *Hill*).

errors, [s]he would not have pleaded guilty and instead would have insisted on going to trial."[29] A reasonable probability "requires a 'substantial,' not just 'conceivable,' likelihood of a different result."[30] Although the focus is not solely on the outcome of a potential trial, appellant still must show that the "outcome of the plea process" was affected in that she would not have pled guilty at trial.[31]

In examining an assertion of ineffective assistance of counsel, this Court has stated that courts need not make a determination as to the first prong of the *Strickland* test, "[if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*."[32] Because this Court can resolve this issue on the prejudice prong, there is no need to determine whether the failure to give advice on sex offender registration is per se ineffective assistance.[33]

Appellant makes the conclusory statement that "[h]ad [she] known that after pleading guilty [she] would have to take [her] place among the ranks of sex offenders, [she] would not have

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[29] *Hill*, 474 U.S. at 59.
[30] *United States v. Bradley*, 71 M.J. 13, 17(C.A.A.F. 2012) (quoting *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011)).
[31] *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008) (quoting *Hill*, 474 U.S. at 59).
[32] *Tippit*, 65 M.J. at 77.
[33] *Cf. Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010) (holding that failure to advise on the collateral consequence of immigration status is ineffective).

entered the pre-trial agreement as written."[34] Like the appellant in *United States v. Vargaspuentes*, appellant in this case "does not otherwise address why [s]he would not have pled guilty and insisted on going to trial."[35] Appellant's post-trial statement completely fails to prove a reasonable probability that she would not have pleaded guilty and instead insisted on a contested kidnapping case.[36] Contrary to appellant's bare conclusions, the objective evidence in the record, including her overwhelming desire to plead guilty, shows that a reasonable person in her position would not have changed her plea.

A. The Overwhelming Evidence against Appellant in Possession of the Government

The record of trial, and the undisputed affidavits of trial defense counsel, reflects that the evidence against appellant

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[34] JA 18-20.

[35] *Vargaspuentes*, 70 M.J. at 505 (appellant seeking relief for defense counsel's alleged failure to advise appellant of the immigration consequences of a conviction merely stated in his post-trial affidavit that "he would not have jeopardized his status in the United States by pleading guilty" had he been so advised).

[36] There do not appear to be any factual conflicts between appellant's affidavit and those of trial defense counsel. Because appellant fails to show prejudice, the facts as alleged in her affidavit "would not result in relief even if any factual dispute were resolved in [her] favor." Therefore, her claim may be rejected without reference to any possible factual dispute. *Vargaspuentes*, 70 M.J. at 504-05 (quoting *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997)).

was overwhelming.[37] The Government had eyewitness identification from the child-victim's mother.[38] CPT MB witnessed appellant carrying away her child and attempting to conceal the child in her backpack.[39] The Government had video surveillance from the hospital tracking appellant's movement through and activities in the hospital at all relevant times, including while she changed her appearance and dressed in hospital scrubs prior to the kidnapping.[40] Also, the Government possessed the evidence seized from appellant's vehicle, including medical scrubs and all manner of infant paraphernalia, despite the fact that appellant had no child.[41]

Furthermore, the Government had appellant's confession in which she admitted to entering the hospital in scrubs and taking the baby from his mother, CPT MB.[42] The confession also contained highly damaging admissions regarding the elaborate steps appellant took to deceive her boyfriend and others into believing that she had birthed a child around the time of the

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[37] MAJ Stewart's affidavit states that it was her opinion that "it was a foregone conclusion that she would be convicted as charged." JA 26.
[38] JA 26.
[39] JA 26.
[40] JA 26.
[41] JA 26.
[42] JA 33-43.

kidnapping.[43] The confession removed any issue as to identity and provided the Government strong proof of motive.

The Government's case had no holes. None are alleged in appellant's affidavit or brief. Appellant's conviction, whether she pleaded guilty or not, was a "foregone conclusion."[44]

B. Evidence of Appellant's "Fervent" Desire to Plead Guilty at the Time of Trial

The maximum punishment facing appellant included confinement for life without the possibility for parole.[45] Again, the undisputed affidavits from trial defense counsel indicate that appellant was informed of this fact and that this fact weighed heavily on her. The "only concern" expressed by appellant during the pretrial negotiations phase of this case was "that regardless of [her attorney's] evaluation of her confinement risk, facing life without eligibility for parole weighted heavily upon her and that if the best cap she could get from the [G]overnment was [eleven] years, then she wanted to take it."[46] This was her primary, and only, concern regardless of the other terms of the pretrial agreement.

Moreover, during her guilty plea appellant swore to the military judge that she had no questions or concerns about her

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[43] JA 33-43.
[44] JA 26.
[45] Manual for Courts-Martial (MCM), pt. IV, para. 92e.
[46] JA 25.

pretrial agreement.[47] Appellant stated, under oath, that she fully understood the pretrial agreement and was satisfied with the advice of her defense counsel.[48] Furthermore, notwithstanding her current claims that "[o]n Monday, 1 August 2011, [she] discovered for the first time that [she] will have to register as a sex offender for life," appellant received the record of trial in this case on 5 August 2010 with two corrected copies of the DA Form 4430 Report of the Result of Trial clearly stating that "[c]onviction does require sex offender registration."[49] Such evidence provides "temporal information" about the appellant's current claims that should inform this Court's analysis as to the likelihood that she would have, had she known of the collateral consequence at issue here, insisted on contesting the charge against her.[50]

C. Appellant's Current Prejudice Arguments Fail

Appellant concedes that she "knew that her conviction at trial was likely."[51] In addition, even when appellant's trial defense counsel told her that her case was unlikely to be

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[47] JA 57.
[48] JA 57.
[49] JA 12-13. DA Form 4430, corrected copy and second corrected copy. Appellant acknowledged receipt of a copy of the record of trial in this case on 5 August 2010 by signing the "Service of Record of Trial on the Accused."
[50] *Vargaspuentes*, 70 M.J. at 506.
[51] Appellant's Brief (AB) 6.

"worth" the maximum punishment available, appellant still wanted a cap on confinement.[52]

Nonetheless, appellant argues that she would have rejected the government's deal on the grounds "that sex offender registration was an unpalatable consequence of pleading guilty."[53] Furthermore, she argues that if she was aware of the sex offender consequences of a conviction, she would have recalibrated her assessment of the benefits of her plea.[54] These arguments are unpersuasive.

First, her arguments ignore that her "fervent desire" at the time of trial was to obtain some ceiling on the extent of her confinement, "regardless of [MAJ Stewart's] evaluation of her confinement risk," and to take "the best cap she could get from the government."[55] Her overriding concern was to avoid the threat of the maximum punishment, life without the possibility of parole.[56] In the face of this undisputed testimony from trial defense counsel, it seems highly unlikely, let alone reasonably probable, that appellant would have "recalibrated her assessment of the benefits of pleading guilty" had she known of the sex offender registration consequences of a conviction.

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[52] AB 17.
[53] AB 16.
[54] AB 16.
[55] JA 25.
[56] JA 25.

Second, these arguments completely ignore the fact that sex offender registration was an inevitable consequence of a conviction, whether that conviction flowed from a guilty plea or a contested case.[57] Any rational accused would have realized that given the overwhelming likelihood of a conviction, sex offender registration was unavoidable, and therefore of little consequence in pretrial negotiations. The rational accused in appellant's situation would have done exactly what she did, seek the best possible cap on confinement that the Government was willing to offer allowing her to avoid a possible life sentence.[58]

In addition, appellant's reliance on *Lafler* is misplaced.[59] In *Lafler*, the Court held that the petitioner was prejudiced by counsel's deficient performance in advising him to reject the plea offer and go to trial.[60] However, in this instance, appellant insisted on the plea agreement she received despite her defense counsel's recommendation against that course.[61] Similarly, appellant's reliance on *Frye* is also flawed.[62] *Frye* established defense counsel's obligation to communicate formal

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[57] *Hill*, 474 U.S. at 60.
[58] *Bradley*, 71 M.J. at 17.
[59] AB at 13.
[60] *United States v. Lafler*, 132 S.Ct. 1376 (2012).
[61] JA 25.
[62] *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

plea offers to his client.[63] There is no such failure by defense counsel in this case.

Appellant speculates that the government would have negotiated to either increase appellant's confinement exposure or elect trial by military judge alone in exchange for removing the "minor" language from the specification.[64] In support of this theory of government acquiescence to a material change that alters and dilutes the very essence of the crime, appellant cites the government's "superior bargaining position."[65] Appellant's reasoning is critically flawed. It's nonsensical to argue that as a result of the government's superior position, it would be willing to surrender the gravamen of its case.

First, it is not even clear whether removing references to a "minor" is legally permissible, nor does appellant offer any alternative offenses that she could have pled to.[66] The phrase "minor whose parent or legal guardian the accused was not" is part of the "wrongfulness" element of the charged offense.[67] The

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[63] *Frye*, 132 S.Ct. at 1408.
[64] AB 15.
[65] AB 15.
[66] For example, there is no lesser included offense for kidnapping described in the MCM except for Article 80, Attempts. But even that would still subject appellant to the same maximum punishment authorized for the charged offense to include mandatory sex offender registration pursuant to DODI 1325.7.
[67] *Manual for Courts-Martial*, United States (2008 ed.) [hereinafter *MCM*], pt. IV, para. 92(c)(5).

victim is either "a minor" or "a person not a minor."[68] Failing to allege that the accused is not the parent of the minor would either: (1) create a charge that fails to state an offense; or (2) allege a simple disorder with a relatively negligible confinement period and possibly no discharge. It defies reason to believe that the government, which appellant concedes has the "superior bargaining position", would even entertain such a plea offer.

Similarly, appellant relies on the forum of trial as proof that the government would have been amenable to removing references to a "minor" in the charge sheet in exchange for appellant electing trial by military judge alone.[69] Appellant's presumption is based on complete speculation and not on the facts from the record.[70] It assumes that the government views the forum selection with the same importance as the charge. Even assuming this Court can speculate as to what the government "would have done," it is unreasonable to believe the government would be willing to surrender the substance of the charge in

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[68] *Id.*

[69] AB 15-16.

[70] *See, e.g., United States v. Lichterman*, 122 F.3d 1075 (9th Cir. 1997) (holding that the defendant failed to demonstrate that he would have received a better bargain, because the possibility of increasing his bargaining power was entirely speculative and unlikely, given the seriousness of the charges and the defendant's role in the offense); *see also Bethel v. United States*, 458 F.3d 711, 720 (7th Cir. 2006)("a claim that a defendant would not have entered this particular plea agreement is not sufficient to show prejudice").

exchange for its forum of choice. Appellant ignores the likely probability that the government made a tactical decision not to insist on a judge alone forum. The government likely shared trial defense counsel's assessment, that regardless of the forum, conviction was "a for[e]gone conclusion."[71] Thus it is completely unreasonable when appellant now contends, that the forum selection would sway the government to abandon the charged offense in the slightest.

The totality of appellant's situation, viewed objectively, reveals that she has completely failed to prove that there was a reasonable probability she would have changed her plea in this case had she known of the sex offender registration consequences. Therefore, she has failed to show prejudice under *Strickland*.

[71] JA 26.

II. WHETHER, IN LIGHT OF *UNITED STATES v. MILLER*, 63 M.J. 452 (C.A.A.F. 2006), THERE IS A SUBSTANTIAL BASIS TO QUESTION APPELLANT'S GUILTY PLEA DUE TO THE MILITARY JUDGE'S FAILURE TO INQUIRE IF TRIAL DEFENSE COUNSEL INFORMED APPELLANT THAT THE OFFENSE TO WHICH SHE PLEADED GUILTY WOULD REQUIRE APPELLANT TO REGISTER AS A SEX OFFENDER.

Summary of Argument

Appellant's misunderstanding of the collateral consequences conviction was not readily apparent to the military judge. Chief reliance to inform and advise an accused on collateral issues must be placed on defense counsel. Any shifting of that burden would undermine the guilty plea process.

Standard of Review

A military judge's acceptance of an accused's guilty plea is reviewed for an "abuse of discretion."[72] Any questions of law arising from the guilty plea are reviewed de novo.[73]

Law and Analysis

United States v. Bedania established the test an appellant must meet when challenging a guilty plea on the basis of an unforeseen collateral consequence: the collateral consequence must be major and the appellant's misunderstanding of the collateral consequence must: (1) result foreseeably and almost inexorably from the language of the pretrial agreement; (2) be

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[72] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).
[73] *Id.*

induced by the trial judge's comments during the providence inquiry; or (3) be made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.[74]

The consequence of this standard is that military judges have no affirmative obligation to inquire into whether an accused is aware of the sex offender registration consequences of his plea. "In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequence of a court-martial conviction and to ascertain his willingness to accept those consequences."[75] Thus, "a court conducting a plea colloquy must advise the defendant of the 'direct consequences of his plea,' but 'need not advise him of all the possible collateral consequences'."[76]

United States v. Miller controls the issue in this case. Miller was convicted of possession of child pornography. During his guilty plea, the military judge did not inform him that there was any requirement that a conviction for possessing child pornography required registration as sex offender.[77] The *Miller* court applied the *Bedania* test and found that Miller's misunderstanding was not the result of the language of the

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[74] *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982); *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006).
[75] *Miller*, 63 M.J. at 457 (quoting *Bedania*, 12 M.J. at 376).
[76] *United States v. Delgado-Ramos*, 635 v. F.3d 1237, 1239 (9th Cir. 2011).
[77] *Miller*, 63 M.J. at 456.

pretrial agreement, induced by the military judge's comments, nor made readily apparent to the military judge.[78] The same holds true in the instant case.

Appellant wishes to modify the *Bedania* test to include errors that "reasonably should have been readily apparent to the military judge."[79] However, appellant obviously misquotes and misapplies the *Bedania* test. Like *Miller*, nothing in appellant's guilty plea made her misunderstanding of any collateral consequence "readily apparent" to the military judge. Moreover, *Miller* imposed no obligation on the military judge to ensure that appellant understood the collateral consequences of her guilty plea.[80] Therefore, there is no substantial basis to question appellant's guilty plea.

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[78] *Id.* at 457.

[79] AB 20.

[80] The Military Judge's Benchbook, Dep't of Army Pam. 27-9, para. 2-2-8 (1 Jan. 2010), advises military judges to ask defense counsel whether they have advised the accused about the sex offender consequences resulting from a finding of guilty. It does not require the military judge to advise the accused as to those consequences, or to otherwise address the accused about his understanding of those consequences. Clearly, the Benchbook's purpose in advising military judges to ask this question was to encourage defense counsel to accept *Miller*'s suggestion that "defense counsel should also state on the record of the court-martial that counsel has complied with this advice requirement." However, this portion of the Benchbook neither puts an affirmative advisory obligation on the military judge, nor renders the absence of such a colloquy between the military judge and defense counsel a basis to overturn a plea. *United States v. Hopkins*, 56 M.J. 393, 394 (C.A.A.F. 2002) (acknowledging the nonbinding guidance in the Military Judge's Benchbook).

Furthermore, if this Court concludes there is no prejudice with respect to appellant's ineffective assistance of counsel claim, then by definition appellant's plea was knowing and voluntary.[81] If the lack of knowledge of sex offender registration did not prejudice appellant under her ineffective assistance claim, then it is not enough to create an involuntary plea.[82]

This Court should not expand *Bedania* to include appellant's case:

Appellant is in fact arguing for a broader reading of *Bedania's* test. There are two reasons why this Court should deny this expansion.

First, it would dramatically shift the burden to inquire about collateral consequences from the accused and his defense counsel to the military judge. Such an expansion is contrary to the history of case law that places chief reliance on defense counsel to inform an accused about collateral consequences of a court-martial conviction.[83] This burden shifting would eliminate

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[81] *See, e.g., Hill*, 474 U.S. at 56.

[82] *Hill*, 474 U.S. at 56 ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (emphasis added).

[83] *See United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007) (as a general matter, a military judge does not have an affirmative obligation to initiate an inquiry into early release programs as part of the plea inquiry); *Miller*, 63 M.J. at 457, citing *United*

an accused's responsibility to assert any misunderstanding of "major" collateral consequences on the record for the military judge to address, while simultaneously expanding what is considered "readily apparent" to a military judge. This Court has recognized that, in a guilty plea setting, the military judge's responsibility should focus on ensuring that such a plea is knowing and voluntary in compliance with RCM 910 and Article 45(b).[84] The defense counsel is in the best position before, during, and after trial to assist her client in navigating the channels of the justice system and advise her client on collateral matters, not the military judge.[85] The attorney

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States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982); *United States v. Williams*, 53 M.J. 293, 296 (C.A.A.F. 2000).

[84] Consistent with Article 45, UCMJ, if an accused sets up matter inconsistent with a guilty plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea; a military judge who fails to do so has abused his or her discretion. *See United States v. Hayes*, 70 M.J. 454 (C.A.A.F. 2012). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002) (the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances-even though the defendant may not know the specific detailed consequences of invoking it).

[85] *United States v. Burt*, 56 MJ 261 (C.A.A.F. 2002) (To be an effective advocate, trial defense counsel is required to discuss with an accused the various components of a military sentence, i.e., confinement, discharge, reduction in rank, and forfeitures, and after such counseling and in accordance with his client's wishes, zealously represent his or her client).

client privilege empowers defense counsel and reinforces her obligation to assist the accused.[86]

Second, an expansion of *Bedania* will open the floodgates to a myriad of appeals on collateral grounds. In any given case, there could be numerous collateral consequences that could be deemed "major." This dramatic shift would inevitably require that the military judge ensure that an accused understand every "major" collateral consequence of her guilty plea. The proposed expansion threatens the finality of all guilty pleas because even when an accused does not state something inconsistent on the record, he can later attack his plea by claiming he was not made aware of a "major" collateral consequence of his conviction.[87] This expansion of *Bedania* makes guilty pleas more vulnerable to challenge by an accused on appeal and as a result, makes it less likely that the government would negotiate with an accused for a guilty plea.

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[86] *See, e.g., United States v. Morrissette*, 70 M.J. 431 (C.A.A.F. 2011) (because the purpose of the Fifth Amendment privilege against self-incrimination is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to criminal acts, testimonial immunity only applies to compelled testimony and not all statements made by an accused; further, for a communication to be considered testimonial, it must, explicitly or implicitly, relate a factual assertion or disclose information).

[87] There are a numerous collateral consequences that affect the most basic Constitutional Rights such as the right to bear arms and the right to vote.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 2, 2013.

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