24 October 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States,
Appellee

v.

KOREY J. TALKINGTON,
Airman First Class (E-3),
United States Air Force,
Appellant

USCA Misc. Dkt. No. 13-0601/AF

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. ACM 37785
	)	USCA Dkt. No. 13-0601/AF
Airman First Class (E-3), KOREY J. TALKINGTON, United States Air Force, Appellant.	)	

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE MEMBERS THAT CONSIDERATION OF SEX OFFENDER REGISTRATION IS "NOT A MATTER BEFORE THEM" AND "FRAUGHT WITH PROBLEMS."

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge, 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 26 April 2013, the Air Force Court of Criminal Appeals affirmed the sentence. *United States v. Talkington*, 2013 WL 1858584, No. ACM 37785 (A.F. Ct. Crim. App. Apr. 26, 2013). J.A. 1-9. This Court has jurisdiction to review the Air Force Court's opinion. Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

On 2-7 October 2010, Airman First Class (A1C) Talkington was tried by a general court-martial composed of officer and enlisted members at Aviano Air Base, Italy. J.A. 1. Contrary to his pleas, he was convicted of one charge and two specifications of attempted aggravated sexual assault and one specification of attempted aggravated sexual contact in violation of Article 80, UCMJ. J.A. 19, 20. Consistent with his pleas, he was acquitted of one charge and specification of sodomy in violation of Article 125, UCMJ. *Id.* A1C Talkington was sentenced to confinement for 8 months, total forfeitures of pay and allowances, reduction to E-1, and a bad-conduct discharge. *Id.* On 19 November 2010, the convening authority approved the findings and sentence as adjudged. J.A. 16, 17.

On 26 April 2013, the Air Force Court of Criminal Appeals affirmed the findings and sentence. J.A. 1. On 24 September 2013, this Honorable Court granted Appellant's petition for review. *United States v. Talkington*, __ M.J. __, No. 13-0601/AF (C.A.A.F. Apr. 26, 2013).

Statement of Facts

In his unsworn statement, A1C Talkington told the members, "I understand that I will have to register as a sex offender for life and with this federal conviction I am not very sure what sort of work I can find." J.A. 64. As a result, the government requested an instruction to the members not to consider sex

offender registration. J.A. 38, 40. The defense objected to the proposed instruction. J.A. 40.

The defense objection was overruled (J.A. 42.), and the military judge instructed the members that "as a general evidentiary matter, evidence regarding possible registration as a sex offender . . . would be characterized as a collateral consequence[], and thus inadmissible . . . ." J.A. 49. He continued, "Possible collateral consequences of the sentence . . . should not be a part of your deliberations . . . ." *Id*. And, "[W]hether or not the accused will be or should be registered as a sex offender . . . is not a matter before you." J.A. 50. Finally, he warned, "In short, use of this limited information is fraught with problems." *Id*.

Summary of Argument

Recently, this Court stated in *United States v. Riley*, 72 M.J. 115, 121 (C.A.A.F. 2013), "sex offender registration consequences can no longer be deemed a collateral consequence of the plea." While *Riley* dealt with a plea of guilty, it is no less applicable to sentencing by members. Sex offender registration is not a collateral consequence.

However, the military judge, without the benefit of *Riley* and over defense objection, advised the members of the opposite. He said: (1) it is collateral, (2) should not be considered, and (3) is fraught with problems. These erroneous instructions substantially influenced Appellant's sentence.

Argument

THE MILITARY JUDGE ERRED BY INSTRUCTING THE MEMBERS THAT CONSIDERATION OF SEX OFFENDER REGISTRATION IS "NOT A MATTER BEFORE THEM" AND "FRAUGHT WITH PROBLEMS."

A. Standard of Review

This Court reviews a military judge's sentencing instructions for an abuse of discretion when objected to by trial defense counsel. *United States v. Barrier*, 61 M.J. 482, 485 (C.A.A.F. 2005); *United States v. Boyd*, 55 M.J. 217, 220 (C.A.A.F. 2001). A failure to properly instruct is tested for whether it had a substantial influence on the sentence. *Boyd*, 55 M.J. at 221.

B. Analysis

In *Riley*, this Court found for the first time that "sex offender registration consequences can no longer be deemed a collateral consequence of [a] plea." *Riley*, 72 M.J. at 121. This Court agreed with the rationale of the Court of Appeals of Michigan in *People v. Fonville*, 291 Mich.App. 363, 804 N.W.3d 878, 894 (2011), that sex offender registration "is a particularly severe penalty," is "'intimately related to the criminal process,'" and the "automatic result . . . [makes it] difficult to 'divorce the penalty [of sex offender registration] from the conviction.'" *Riley*, 72 M.J. at 120, 121. Given these findings in *Riley*, the military judge's instructions to the members in Appellant's sentencing case that "possible sex offender registration is simply not

before you" and "use of this limited information . . . is fraught with problems" was an abuse of discretion that substantially influenced the sentence. J.A. 66.

The military judge's erroneous view of sex offender registration as a collateral administrative consequence ultimately led to his instructions that sex offender registration was "not before" the members and was "fraught with problems." *Id.* Essentially the military judge instructed the members not to consider what they should have been allowed to consider as appropriate mitigating evidence. This Court's findings in *Riley* should be extended to make clear that sex offender registration is a direct consequence of the conviction, which the members should consider in sentencing. If trial counsel believes sex offender registration is not likely or required, then he or she is always free to put on evidence rebutting an accused's assertion of that consequence. *See* Rule for Courts-Martial 1001(c)(2)(C). Instead, in Appellant's case, trial counsel requested an instruction directing the members not to consider Appellant's statement about having to register as a sex offender. J.A. 40. The military judge ultimately gave such an instruction. J.A. 66.

Having found in *Riley* that sex offender registration is a particularly severe penalty and is intimately linked with the conviction, this Court should now clarify that sex offender registration is not collateral for sentencing purposes.

The Army Court of Criminal Appeals in *United States v. Macias*, 53 M.J. 728, 731 (Army Ct. Crim. App. Jun. 1999), found that "community notification of [sex offender registration], often via an internet posting, often produces adverse consequences and stigma far exceeding that of a punitive discharge." That court continued to find, "the military judge abused her discretion by being unduly restrictive in prohibiting appellant from bringing this matter to the attention of the sentencing authority during his unsworn statement." *Id.* at 732. Thus, as far back as 1999, the Army Court of Criminal Appeals found that sex offender registration exceeds the stigma of a punitive discharge and was something that an accused could appropriately put before members in sentencing.

In contrast, the Air Force Court's opinion in this case, which was issued 10 days after *Riley*, failed to recognize the severe stigma of sex offender registration and that it is no longer a collateral consequence.

In *Boyd*, this Court required that military judges "instruct on the impact of a punitive discharge on retirement benefits." 55 M.J. at 221. If members are required to be notified of the effect their adjudged sentence will have on an accused's eligibility for military retirement benefits, it stands to reason that members should be made aware of the effect of sex offender registration, especially in light of the severity of such a penalty. By instructing the members to disregard Appellant's

reference to sex offender registration, the military judge abused his discretion. Much like the prejudice that results from not instructing on the effect of a punitive discharge on potential retirement benefits, Appellant suffered prejudice when the members were instructed not consider that he would probably have to register as a sex offender for life. Therefore, the military judge's clearly erroneous instructions deprived the members of sentencing evidence that may have substantially influenced Appellant's sentence.

The military judge also erred by failing to explain why he ultimately deviated from the standard instruction he originally claimed he would give. J.A. 687. An accused's unsworn statement is "a valuable right," and the scope of an unsworn statement is "generally considered unrestricted." *United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998) (citation and internal quotation marks omitted). According to the Military Judges' Benchbook, if an accused brings up matters otherwise inadmissible during an unsworn statement, a military judge "must be careful not to suggest that the members should disregard the accused's unsworn statement." Dep't of the Army, Pam. 27-9, Military Judges' Benchbook ch. 2, § V, para. 2-5-23 (1 Jan 2010). In such circumstances, the Military Judges' Benchbook recommends giving the following instruction:

> The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) . . . . An unsworn statement is a proper means to bring information to your

> attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. . . . Your duty is to adjudge an appropriate sentence for this accused that you regard as fair and just when it is imposed and not one whose fairness depends upon actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases).

Id.

In *Riley*, this Court held that "an individual military judge should not deviate significantly from [the Benchbook] without explaining his or her reasons on the record." 72 M.J. at 122 (citation and internal quotation marks omitted). However, the military judge in Appellant's case deviated significantly from this instruction and added language that "sex offender registration is simply not before you" and "use of this limited information provided by the accused in his unsworn statement . . . is fraught with problems." J.A. 66.

Trial defense counsel properly objected to these instructions. J.A. 40. These instructions were clearly erroneous because they directly contradict the standard instruction in the Benchbook, which allows members to consider such information raised by an accused in an unsworn statement. Such an instruction effectively directed the members to disregard all information about sex offender registration, which arguably was the most important portion of Appellant's unsworn statement. Consequently, the military judge's erroneous instructions had a substantial influence on Appellant's sentence.

Conclusion

The military judge abused his discretion by treating sex offender registration as a collateral administrative consequence, instructing the members that sex offender registration was "not before" them and was "fraught with problems." The military judge also abused his discretion by significantly deviating from the standard unsworn statement instruction without explaining his rationale on the record. These abuses of discretion prejudiced Appellant by substantially influencing Appellant's sentence.

WHEREFORE, this Honorable Court should remand Appellant's case for a rehearing on the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 24 October 2013.

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