12 December 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	REPLY TO GOVERNMENT'S ANSWER
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:

COMES NOW the Appellant, by and through counsel, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and files this reply to the Government's answer.

Statement of Facts

Any additional facts pertinent to the disposition of the granted issue are included below in Appellant's argument.

Additional 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."

This Court held in *United States v. Barrier*, 61 M.J. 482, 486 (C.A.A.F. 2005) that an instruction from the military judge placing an unsworn statement in its proper context is preferable to exclusion. *See also United States v. Rosato,* 32 M.J. 93, 96 (C.M.A. 1991); *United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F.

1998). Moreover, this Court reviews "a military judge's decision to give a sentencing instruction for an abuse of discretion." *Barrier*, 61 M.J. at 485. However, the military judge's instruction must accurately apply the law. *Id.*

In *Barrier*, the accused engaged in sentence comparison during his unsworn statement. In response, the military judge provided the members with a *Friedmann*[1] instruction. *Id.* at 483. This Court in *Barrier* held that the military judge did not abuse his discretion by instructing the members that the accused's sentence comparisons were irrelevant because such comparisons were prohibited by case law. *Id.* at 486. Appellant's case is distinguishable from *Barrier* because the military judge did not accurately apply the law in his instructions, and in accordance with *United States v. Riley,* 72 M.J. 115, 120 (C.A.A.F. 2013), sex offender registration is a "particularly severe penalty" and an "automatic result" of the conviction. Such a penalty should be considered by the sentencing authority as mitigating evidence pursuant to R.C.M. 1001(c)(1)(B).

The military judge did not accurately apply the law in his instruction because he ignored the fact that Appellant was required to register as a sex offender according to 42 U.S.C. § 16911 et seq., the Sex Offender Registration and Notification Act (SORNA), that failure to register was a crime under 18 U.S.C §

[1] *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (C.A.A.F. 2001).

2250, and that the Secretary of Defense mandated registration for Appellant's crimes in Department of Defense Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Enclosure 27. Pursuant to *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006), which was in effect at the time of Appellant's trial, Appellant's defense counsel was required to be aware whether Appellant would have to register as a sex offender and inform Appellant appropriately. If defense counsel was capable of determining the status of the law with regard to sex offender registration, then the military judge should have been able to apply SORNA correctly when fashioning an appropriate instruction. Instead, the military judge instructed that "sex offender registration requirements . . . may differ between jurisdictions . . . [and] use of this limited information is fraught with problems." J.A. at 50.

Furthermore, the Appellant mentioned in his unsworn statement that he planned "to go back home to Ohio" (J.A. 64), so the military judge could have also easily determined whether or not Appellant's claim was accurate with regard to Ohio. Trial counsel could have also rebutted Appellant's claim, if false, in accordance with R.C.M. 1001(c)(2)(C) by submitting the appropriate statute from Ohio in rebuttal or asking the military judge to take judicial notice of the statute. Instead of correctly applying the law to his instruction, the military judge discredited Appellant's claim in his unsworn statement that he

would have to register as a sex offender by instructing that such information was "fraught with problems" and "not necessarily predictable with any degree of accuracy." J.A. 50.

The military judge abused his discretion by giving these instructions. Despite the requirement to register under SORNA and knowledge of the state in which Appellant intended to reside, the military judge instructed the members that it was not possible to know if Appellant would have to register as a sex offender. This was not only a misstatement of the law, it also failed to put Appellant's unsworn statement in the proper context as required by *Barrier. Barrier,* 61 M.J. at 486.

R.C.M. 1001(c)(1)(B) permits the defense to introduce "[m]atter[s] in mitigation . . . to lessen the punishment to be adjudged by a court-martial, or to furnish grounds for a recommendation of clemency." Defense counsel often argue that having a federal conviction is mitigating in sentencing. Appellant also raised this issue in his unsworn statement. J.A. 64. However, trial counsel did not object, and the military judge did not instruct on this collateral consequence. One would not expect an objection or limiting instruction from the military judge if Appellant had mentioned in his unsworn statement that his wife had left him as the result of his conviction. Such matters are frequently submitted or argued without contest even though they are collateral consequences of the conviction.

Sex offender registration, as described by this Court in

Riley, "is a particularly severe penalty." 72 M.J. at 120. "In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including for example, residency-reporting requirements and place of domicile restrictions." *Id.* at 120-121 (citation omitted). Given this special status, evidence of an accused's legal obligation to register as a sex offender should be admissible as mitigating evidence pursuant to R.C.M. 1001(c)(1)(B), and the members were improperly instructed that sex offender registration was "not a matter before them." J.A. 699. It is worth noting that before instructing the members not to consider Appellant's reference to sex offender registration in his unsworn statement, the military judge was willing to let Appellant's mother testify that she was aware that Appellant would have to register as a sex offender over the objection of trial counsel. J.A. 30.

The military judge's instructions prohibited the members from considering sex offender registration, which substantially influenced Appellant's sentence. *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001). "A panel is presumed to understand and follow the instructions of the military judge absent competent evidence to the contrary." *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). Because the military judge instructed the members that sex offender registration was "not before them" and "fraught with problems," it is presumed that the members did

not consider sex offense registration in fashioning a sentence.

Moreover, in light of Appellant's convictions for crimes of attempt (J.A. 10, 11), especially when balanced against the severe penalty of sex offender registration for life, it is difficult to see how depriving the members of this information could not have substantially influenced the sentence. Trial counsel's repeated and consistent objections to defense counsel's attempts to put sex offense registration before the members (J.A. 30, 37), including addressing the topic in sentencing rebuttal argument (J.A. 710, 711), illustrate further that this information was significant, and that consideration of the requirement to register as a sex offender would have had a substantial influence on Appellant's sentence.

WHEREFORE, Appellant requests that this Court authorize a sentence rehearing.

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 12 December 2013.

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