

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Ruben CRUZ
Damage Controlman First Class
Petty Officer (E-6)
U.S. Navy,

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202400211

USCA Dkt. No.

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

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Issues Presented

I.

Whether the lower court erred when it analyzed the Convening Authority's endorsement of Appellant's request to transfer into the Fleet Reserve as a collateral consequence of the conviction rather than as a material term of the plea agreement.

II.

Whether the lower court erred in finding no prejudice for Appellant's claim of ineffective assistance of counsel where trial defense counsel provided erroneous advice on the determinative issue in Appellant's decision to accept the plea deal.

Introduction

Appellant's top priority when deciding to plead guilty was securing his transfer to the Fleet Reserves. Transfer was essential so that he could receive the retirement pay that his service and his family's sacrifices had earned. His Trial Defense Counsel negotiated to delay Appellant's guilty plea until he reached twenty years of service. Additionally, Trial Defense Counsel secured a provision in the plea agreement that Appellant believed would result in a recommendation from the command that the Secretary of the Navy *grant* Appellant's Fleet Reserve request. Believing that this plea agreement would maximize his chance for transfer to the Fleet Reserve, and relying on the Government's promise within the plea, Appellant pled guilty.

Much to Appellant's surprise, his command *negatively* endorsed his request to transfer to the Fleet Reserve. The Trial Defense Counsel failed to advise Appellant that a negative endorsement could occur—not because a negative endorsement was in violation of his understanding of the plea agreement (which it was), but because the Trial Defense Counsel was ignorant of the endorsement process in general.

Thus, Appellant asks this Court to grant the Petition for Review because (1) Appellant misunderstood a material fact of the plea agreement and would not have pled guilty had he understood his command could have negatively endorsed his request; and (2) Appellant's counsel was ineffective in failing to advise Appellant

that his Command could negatively endorse his Fleet Reserve transfer request.

Statement of Statutory Jurisdiction

Appellant filed a timely Notice of Appeal with the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The lower court reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).¹ Accordingly, this Court has jurisdiction under Article 67(a)(3), UCMJ.²

Statement of the Case

A Special Court-Martial consisting of a military judge alone convicted Appellant, pursuant to his pleas, of conspiracy to distribute a controlled substance in violation of Article 81, UCMJ, and wrongful distribution of a controlled substance in violation of Article 112a, UCMJ.³ The Military Judge sentenced him to reduction to E-1 and confinement for six months.⁴ The convening authority took no action on the findings or sentence, which the Military Judge entered into judgment.⁵ The lower court affirmed the findings and sentence.⁶

¹ 10 U.S.C. § 866(b)(1)(A).

² 10 U.S.C. § 867(a)(3).

³ R. at 10, 49; 10 U.S.C. §§ 881, 912a (2018).

⁴ R. at 62.

⁵ Convening Authority's Action; Entry of Judgment.

⁶ *United States v. Cruz*, No. 202400211, slip. op. (N-M. Ct. Crim. App. Jan. 20, 2026) (unpublished).

Statement of Facts

Appellant entered into plea negotiations with the Convening Authority (CA) when he was still several months shy of retirement eligibility.⁷ He was facing charges of sending Schedule III substances to his girlfriend who was in a local jail so that she could sell them to other inmates and was at risk of losing not only his freedom, rank, and income but also his retirement benefits.⁸

Appellant discussed his concern about retirement benefits with his Trial Defense Counsel (TDC) who told Appellant that he could not receive those retirement benefits if he did not make it to twenty years of service or if he received a punitive discharge.⁹ However, TDC assured him that the Secretary of the Navy (SECNAV) regularly approves retirement requests for people who have been convicted of far more serious crimes.¹⁰ Therefore, TDC advised, Appellant's best shot at keeping his pension lay in negotiating with the CA to both delay the hearing until Appellant was at twenty years of service and receive protection from receiving a punitive discharge in exchange for a plea of guilty.¹¹ Appellant could then apply

⁷ *Cruz*, slip. op. at 2.

⁸ Charge Sheet.

⁹ Mot. to Attach, Appendix A.

¹⁰ Mot. to Attach, Appendix A.

¹¹ *Id.*

to the Fleet Reserve at whatever rank he retained after the court-martial.¹² Appellant agreed.

Negotiating for those terms required Appellant and TDC to put it all on the table: they did not hide from the CA that their goal was to get Appellant to twenty years and avoid a punitive discharge so Appellant would be eligible for the Fleet Reserves.

Ultimately, the parties agreed that Appellant would plead guilty and accept six months of confinement and a reduction to E-1. In exchange, the case was moved to a Special Court-Martial to be tried after Appellant reached twenty years of service, with no possibility of a punitive discharge.¹³ Appellant and the CA agreed to this provision so that Appellant could submit his transfer into the Fleet Reserves. Appellant also agreed to waive any administrative discharge board and to submit that waiver—which would include his request to transfer into the Fleet Reserve—the day before his plea hearing.¹⁴

The parties also agreed to the following language:

I understand that approval to transfer to the Fleet Reserve List is at the sole discretion of the Secretary of the Navy, and that my request may be disapproved. I understand this or another Convening Authority/Separation Authority may recommend my transfer in a

¹² *Id.*

¹³ App. Ex. I at 4-5 (emphasis in original).

¹⁴ App. Ex. I at 4 (emphasis in original).

reduced pay grade, or that SECNAV may approve my transfer in a reduced pay grade.¹⁵

Additionally, the plea agreement stated, “I also understand the decision to allow a Sailor to transfer to the Fleet Reserve at all, or in a particular pay grade is the sole prerogative of SECNAV who is not party to the agreement.”¹⁶ The plea agreement also stated that “[t]here are no other written, oral, or implied agreements” between those who were party to the agreement.¹⁷

However, during the negotiations that resulted in these terms, TDC never negotiated for a term regarding whether the CA would positively or negatively endorse Appellant’s request to transfer to the Fleet Reserve.¹⁸ Trial Defense Counsel never told Appellant that the CA would need to provide an endorsement on Appellant’s Fleet Reserve request. Also, TDC never told Appellant how that endorsement could impact SECNAV’s decision to accept or deny Appellant’s request. And, critically, the CA never told TDC or Appellant that they intended to negatively endorse Appellant’s Fleet Reserve request.¹⁹

Appellant fulfilled his end of the bargain and pled guilty. He was reduced to E-1 and served his confinement. As agreed upon in the plea agreement, he submitted

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 1.

¹⁸ Mot. to Attach, Appendix A.

¹⁹ *Id.*

his request for transfer into the Fleet Reserve. And, as was not explicitly mentioned in the plea agreement (although the opposite was implied), the CA provided a negative endorsement in routing the request up to SECNAV, stating, “I recommend disapproval of now-DCFR Cruz’s request to transfer to the Fleet Reserve.”²⁰ SECNAV denied the request and Appellant will not receive a pension.

On appeal, Appellant argued to the lower court that his plea was improvident for two reasons. The first is due to a misunderstanding of how the CA would process his Fleet Reserve request.²¹ The second being that his TDC was ineffective for not advising him that the CA might negatively endorse the request.²²

The lower court treated the matter of Appellant’s transfer to the Fleet Reserve as a collateral issue, despite it being a bargained-for term in the plea agreement.²³ The lower court did not conduct an analysis of whether the issue of Appellant’s transfer to the Fleet Reserve had been “interjected into the proceedings by the PTA,” as in *United States v. Williams*.²⁴ As a result, the lower court applied the more stringent analysis from *United States v. Bedania* rather than the “benefit of the

²⁰ Mot. to Attach, Appendix A, Attach, 2.

²¹ *Cruz*, slip. op. at 1-2.

²² *Id.*

²³ *Id.* at 5-6 (the parties bargained to delay the plea hearing until Appellant was eligible to request transfer to the Fleet Reserve for example).

²⁴ *United States v. Williams*, 53 M.J. 293, 295 (C.A.A.F. 2000) (quoting *United States v. Olson*, 25 M.J. 293, 297 (C.M.A. 1987)).

bargain” analysis laid out in *Santobello v. New York* and its progeny.²⁵ The lower court ignored the bargain struck between the two parties and focused solely on certain language in the plea agreement in which Appellant agreed that he understood that SECNAV could deny his Fleet Reserve request.²⁶

While this case was being briefed to the lower court, this Court issued their opinion in *United States v. Suarez*.²⁷ In *Suarez*, this Court stated “the relevant question is not whether [the appellant] would have achieved a better result absent the erroneous advice but whether he would have chosen to plead guilty in the first place.”²⁸ This Court remanded *Suarez* because the lower court “*articulated* the correct prejudice standard but then erred when it *applied* a different standard, concluding as a matter of law that there was no prejudice because the appellant would not have fared better absent trial defense counsel’s advice.”²⁹

The lower court decided Appellant’s ineffective assistance of counsel claim based solely on the prejudice prong of *Strickland v. Washington*.³⁰ In doing so, they

²⁵ *Cruz*, slip. op. at 6; *United States v. Bedania* 12 M.J. 373, 376 (C.M.A. 1982); *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

²⁶ *Cruz*, slip. op. at 8.

²⁷ *United States v. Suarez*, 86 M.J. 65 (C.A.A.F. 2025).

²⁸ *Id.* at 74.

²⁹ *Id.* (emphasis in original).

³⁰ *Cruz*, No. 202400211, slip. op. at 9-10 (quoting *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

articulated the standard that this Court reaffirmed in *Suarez*.³¹ Their analysis, however, focused entirely on the strength of the government’s case and the weakness of Appellant’s cases on the merits and in sentencing.³² In other words, they focused on factors relevant to an analysis of whether Appellant would have received a better outcome had his TDC not provided erroneous advice. The lower court did not analyze whether Appellant’s goal of having a chance at being accepted in the Fleet Reserve was the “determinative issue” in his accepting the plea deal, as required by *Lee v. United States*.³³

Reasons to Grant Review

A. The lower court’s analysis was contrary to this Court’s decision in *United States v. Olson*.

The lower court’s holding that Appellant failed to show “any misunderstanding of a collateral consequence” because “he knew there was a possibility that his request to transfer to the Fleet Reserve may be denied” directly contradicts this Court’s binding precedent in *United States v. Olson*.³⁴ Specifically, the lower court ignored the bargained-for material term in the plea agreement and focused on a consequence that Appellant never claimed to have misunderstood.³⁵

³¹ *Id.* at 10.

³² *Id.* at 11-12.

³³ *Lee v. United States*, 582 U.S. 357, 361, 371 (2017).

³⁴ *Cruz*, slip. op. at 8.

³⁵ *Cruz*, slip. op. at 8.

Consequences that would normally be considered collateral, such as administrative discharge, deportation, prohibition of gun ownership, loss of a security clearance, government recoupment of benefits or damages, and negative endorsements of Fleet Reserve requests, among others, become material terms when they have “been interjected into the criminal proceeding by the pretrial agreement and by the parties’ interpretation of that agreement at the time of trial.”³⁶ When an appellant does “not receive the benefit of the bargained-for pretrial agreement, the pleas would be treated as improvident, the findings would be set aside, and he would be subject to retrial.”³⁷

The lower court ignored this binding precedent in favor of the collateral-consequences analysis from *United States v. Bedania*.³⁸ However, *Bedania* applies to cases where the collateral consequences that the appellant is relying upon as the basis for contesting the guilty plea were not bargained-for terms contained within the plea agreement—in other words, consequences that were unforeseen, unexpected, or unanticipated by the parties and the plea agreement.³⁹

³⁶ *United States v. Olson*, 25 M.J. 293, 297 (C.M.A. 1987).

³⁷ *United States v. Mitchell*, 50 M.J. 79, 82 (C.A.A.F. 1997); see generally *Santobello*, 404 U.S. 257 (an accused is entitled to the benefit of the bargain on which his guilty plea is based).

³⁸ *Cruz*, slip. op. at 5-6.

³⁹ *Olson*, 25 M.J. at 297 (“[A]n accused is not entitled to relief when, after pleading guilty, he discovers that there are unforeseen collateral consequences of his conviction.” “[W]e denied relief to an accused whose guilty plea and subsequent conviction exposed him to the unexpected collateral consequence of an

Here, Appellant’s request to transfer to the Fleet Reserve was a bargained-for term in the plea agreement: the parties agreed to delay the plea hearing until Appellant was eligible for transfer to the Fleet Reserve and the plea agreement itself contained language regarding Appellant’s understanding that the convening authority could recommend his transfer to the Fleet Reserve at a lower rank. Thus, under *Olson*, what may normally be a collateral consequence of a conviction (whether a convening authority would recommend a person convicted at a court-martial be accepted into the Fleet Reserve) was “interjected into the proceedings,” and is a material term of the agreement. As such, it is subject to the analysis in *Mitchell* regarding the benefit of the bargain.

Because the lower court’s analysis ignored this material term and instead focused solely on the SECDEF’s decision, an analysis of the substantive issue in the appeal was precluded. Thus the lower court’s analysis was contrary to this Court’s binding precedent.

B. The lower court’s analysis was contrary to this Court’s decision in *United States v. Suarez*.

Just last year, this Court remanded *Suarez* because the lower court, while articulating the proper analysis, nevertheless applied the incorrect analysis. *Suarez*

administrative discharge.” “Olson would not be entitled to withdraw his guilty pleas merely because his conviction exposed him to consequences he never anticipated.”).

reaffirmed that the proper prejudice analysis in ineffective assistance of counsel claims involving a guilty plea “is not whether Appellant would have achieved a better result absent the erroneous advice but whether he would have chosen to plead guilty in the first place.”⁴⁰ This Court cited *Lee v. United States*, where the United States Supreme Court analyzed and clarified the difference between ineffective assistance of counsel claims that “involved a claim of attorney error ‘during the course of a legal proceeding’” and claims in which “counsel’s ‘deficient performance arguably led to not a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.’”⁴¹ The Supreme Court found that, because they could not accord a presumption of reliability to “judicial proceedings that never took place,” a court must consider whether the appellant “was prejudiced by the ‘denial of the entire judicial proceeding . . . to which he had a right.’”⁴²

Lee reaffirmed the Supreme Court’s holding in *Hill v. Lockhart* that an appellant “can show prejudice by demonstrating a ‘reasonable possibility that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial,’”⁴³ The inquiry to determine whether that possibility is reasonable must focus “on a defendant’s decisionmaking, which may not turn solely on the

⁴⁰ *Suarez*, 86 M.J. at 74.

⁴¹ *Id.*; *Lee*, 582 U.S. at 364 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 483 (2000)).

⁴² *Id.*

⁴³ *Id.* at 365-65 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

likelihood of conviction after trial.”⁴⁴ That focus must be on whether the reason an appellant is claiming they would have rejected the deal “was the determinative issue in [the] decision whether to accept the plea deal.”⁴⁵

The lower court here also cited to *Lee* in its decision. The lower court said, “The Government’s case against Appellant for conspiracy to distribute a controlled substance and wrongful distribution of a controlled substance was comprehensive.”⁴⁶ The footnote quoted this sentence in *Lee*: “Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.”⁴⁷ The lower court then laid out a number of facts in analyzing Appellant’s “likelihood of conviction at trial” and success in presentencing.⁴⁸ Such facts included the government’s evidence of jailhouse calls, images, lab results, and the evidence that Appellant provided in extenuation and mitigation at the plea hearing.⁴⁹

This one footnote was the only reference the lower court made to *Lee v. United States*. At no point though did the lower court analyze whether Appellant’s desire to receive retirement benefits was the “determinative issue” in Appellant’s decision to

⁴⁴ *Id.* at 367.

⁴⁵ *Id.* at 369 (internal quotation marks omitted).

⁴⁶ *Cruz*, slip. op. at 11.

⁴⁷ *Id.* at 8 n.27.

⁴⁸ *Id.* at 8.

⁴⁹ *Id.*

accept the plea deal. They did not analyze Appellant’s decision-making to determine whether he would have rejected any plea deal involving a negative endorsement of his Fleet Reserve request “in favor of throwing a ‘Hail Mary’ at trial.”⁵⁰ Instead, the lower court merely weighed Appellant’s likelihood of acquittal at trial, or a better outcome at sentencing, and determined that “Appellant has not demonstrated prejudice in this case and has not established he received ineffective assistance of counsel.”⁵¹

This demonstrates that despite this Court’s reaffirmation of the proper analysis in *Suarez*, the lower court is still only articulating the analysis while not applying it. Thus, the lower court’s decision is contrary to this Court’s precedent.

Conclusion

The lower court’s failure to apply the proper analyses resulted in the continued denial of Appellant’s right to a fair trial. The benefits of plea bargains “presuppose fairness in securing agreement between an accused and a prosecutor,” or convening authority in the military context.⁵² In order to be fair, that plea must be “voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.”⁵³ Because Appellant’s TDC erroneously failed to

⁵⁰ *Lee*, 582 U.S. at 368.

⁵¹ *Cruz*, slip. op. at 12.

⁵² *Santobello*, 404 U.S. at 261.

⁵³ *Id.*

advise him that, despite the specially negotiated plea provision, Appellant's Command could still negatively endorse his request, Appellant's plea was not voluntary or knowing. There was no meeting of the minds and he did not receive the benefit of his bargain. On appeal, the lower court never reached the question of the benefit of the bargain because they applied the improper analysis by ignoring a material term and focusing instead on collateral issue. Additionally, the lower court failed to apply the proper analysis to the question of prejudice by looking only to Appellant's likelihood of success at trial instead of focusing on the denial of his right to that trial. This departure from the accepted course of judicial proceedings resulted in the continued violation of Appellant's rights and, accordingly, this Court should grant the Petition for Review.

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Appendix

A. *United States v. Cruz*, No. 202400211, slip. op. (N-M. Ct. Crim. App. Jan. 20, 2026) (unpublished).

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 21(b) because it contains 3,620 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

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Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on
19 February 2026.

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This opinion is subject to administrative correction before final disposition.

United States Navy - Marine Corps
Court of Criminal Appeals

Before
DALY, KISOR, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

Ruben CRUZ
Damage Controlman First Class (E-6), U.S. Navy
Appellant

No. 202400211

Decided: 20 January 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Hayes C. Larsen

Sentence adjudged 4 August 2022 by a special court-martial tried at Naval Station Norfolk, Virginia, consisting of military judge alone. Sentence in the Entry of Judgment: reduction in grade to E-1 and confinement for six months.

For Appellant:
Lieutenant Commander Leah M. Fontenot, JAGC, USN

For Appellee:
Commander John T. Cole, JAGC, USN
Major Mary Claire Finnen, USMC

Judge de GROOT delivered the opinion of the Court, in which Chief Judge DALY and Senior Judge KISOR joined.

**This opinion does not serve as binding precedent, but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

de GROOT, Judge:

A military judge convicted Appellant, in accordance with his pleas, of one specification of conspiracy to distribute a controlled substance and one specification of wrongful distribution of a controlled substance in violation of Articles 81 and 112a, Uniform Code of Military Justice (UCMJ).¹ The military judge sentenced Appellant to reduction to the grade of E-1 and confinement for six months.

Appellant asserts the following assignments of error: (1) Appellant’s plea was improvident due to a misunderstanding of a material term of the plea agreement, and (2) Appellant’s trial defense counsel was ineffective for failing to investigate how the convening authority would endorse Appellant’s Fleet Reserve transfer request while advising Appellant that his request was “not in the realm” of getting disapproved by the Secretary of the Navy (SECNAV), which adversely affected Appellant’s decision to plead guilty.² We find no prejudicial error and affirm.

I. BACKGROUND

Appellant, a Sailor with almost 20 years of service, pleaded guilty to the distribution of the drugs to Ms. H and Ms. S, who were inmates at the Hampton Roads Regional Jail by mailing drugs to them, and to conspiring with Ms. H and Ms. S for them to distribute the drugs, that he mailed, to other inmates at

¹ 10 U.S.C. §§ 881, 912a.

² Appellant also raised a third assignment of error: the sentence was inappropriately severe where it resulted in the loss of retirement pay and benefits worth more than 1.8 million dollars. We carefully considered the matters raised by Appellant in his brief and find it does not require discussion or relief. *See United States v. Matias* 25 M.J. 356, 361 (C.M.A. 1987).

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the Hampton Roads Regional Jail.³ Ms. H, Appellant’s then-girlfriend, and Ms. S asked Appellant on several occasions, via phone calls from jail, to purchase Suboxone strips.⁴ He then mailed those strips to Ms. H and Ms. S in jail, and after they received them, Ms. H and Ms. S would then sell and distribute the drugs to fellow inmates.

Just months before Appellant would have completed 20 years of service, charges were preferred, and Appellant entered into a plea agreement with the convening authority, which included limitations to the authorized punishment, forum of court-martial, and timing of his trial, among other negotiated provisions.⁵ Appellant now asserts he had a misunderstanding of his opportunity to transfer to the Fleet Reserves after his conviction, thereby making his plea improvident. Appellant takes issue with the following paragraph from the plea agreement:

I understand the approval to transfer to the Fleet Reserve List is at the sole discretion of the Secretary of the Navy, and that my request may be disapproved. I understand this or another Convening Authority/Separation Authority may recommend my transfer in a reduced pay grade or that SECNAV may approve my transfer in a reduced pay grade.⁶

Appellant argues that the plea agreement, by declaring that the convening authority could recommend transfer in a reduced pay grade, along with the military judge ensuring Appellant understood that the convening authority could not promise that Appellant would be transferred to the Fleet Reserve, implied that the convening authority would positively endorse his request. Appellant also argues that his defense counsel was ineffective for not notifying him prior to his decision to plead guilty that the convening authority could or would negatively endorse his request to transfer to the Fleet Reserve. Appellant stated that if he had known the endorsement would be negative, he would not have pleaded guilty. Appellant would have “pursued every other avenue

³ All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

⁴ Suboxone, also known as Buprenorphine, is a Schedule III controlled substance under 21 U.S.C. § 812 of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

⁵ App. Ex. I.

⁶ App. Ex. I.

available, to include a full contested trial, to get a fair chance of entering the Fleet Reserve” and would not have agreed to the plea agreement as written.⁷

II. DISCUSSION

A. Appellant’s Plea Was Not Improvident.

1. *Standard of Review/Law*

Appellant states that his pleas were improvident because they were based on a misunderstanding of a material term of the plea agreement. We “review claims as to the providency of a plea under a de novo standard.”⁸

[W]hen collateral consequences of a court-martial conviction—such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation—are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant’s misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge’s comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding.⁹

2. *Analysis*

Appellant argues that both the express terms of the plea agreement and the colloquy with the military judge implied a positive endorsement of his Fleet Reserve transfer request by the convening authority. Looking specifically at the paragraph of the plea agreement at issue, as written above, Appellant argues that this term implied the convening authority would positively endorse Appellant’s transfer, because the agreement stated “this or another convening authority may recommend [his] transfer at a reduced paygrade.” Put somewhat differently, Appellant argues that by agreeing to forward his transfer request, the convening authority implicitly agreed to favorably endorse it. Appellant states he believed the convening authority would endorse his transfer to

⁷ Decl. of Appellant at 3 (Apr. 3, 2025). The Court granted Appellant’s motion to attach his declaration on 8 April 2025.

⁸ *United States v. Pena*, 64 M.J. 259, 267 (C.A.A.F. 2007) (citing *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)).

⁹ *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982).

the Fleet Reserve, but perhaps only in a reduced paygrade. During the providence inquiry, when the military judge questioned Appellant as to whether he understood “that the convening authority in this case cannot promise [Appellant] that [he] would be actually transferred to the Fleet Reserves,”¹⁰ Appellant contends that the military judge’s focus on the convening authority’s inability to make promises that Appellant would be transferred to the Fleet Reserve also induced Appellant to believe the convening authority would positively endorse the request.¹¹ However, the military judge continued the colloquy and asked if Appellant understood that only the SECNAV or the “Bureau of Personnel” could approve his transfer and could deny his transfer based on the conviction, to which Appellant indicated he understood and still wanted to enter into the agreement.¹² Appellant’s argument fails, because it requires an unattainable leap of logic.

Appellant fails to show that he had a misunderstanding of a collateral consequence of pleading guilty as it pertains to his request to transfer to the Fleet Reserve. In his affidavit, Appellant stated his counsel told him he could plead guilty with certain punishments, an administrative discharge, and apply to the Fleet Reserve or plead not guilty and contest the charges, which would be challenging due to the strength of the evidence, and then he may not be able to apply to the Fleet Reserve.¹³ He chose to plead guilty. His plea agreement included delaying his court-martial in order for him to reach 20 years of service and protected him from a punitive discharge. These negotiated portions of the plea agreement not only provided Appellant an opportunity to waive his administrative board and request transfer to the Fleet Reserve, but it also included language to confirm he understood the sole authority to approve or disapprove the request to transfer to Fleet Reserve rests with the SECNAV.

Appellant now states he was unaware that the commanding officer would provide an endorsement on his request to waive his administrative board in order to transfer to the Fleet Reserve. Appellant’s affidavit states:

The role of my [commanding officer] from USS RAMAGE was not explained or brought up to me until the negative endorsement was sent to SECNAV while I was in the brig (after I already signed the plea agreement). Up to this point I was not

¹⁰ R. at 40.

¹¹ Appellant’s Brief at 11-12.

¹² R. at 40.

¹³ Decl. of Appellant at 1-2.

aware that my command would play a significant role in the approval process for transfer to the Fleet Reserve. I understood that SECNAV would make the decision.¹⁴

Appellant was correct when he said in his affidavit that he believed the SECNAV would make the decision regarding approval of his Fleet Reserve transfer request.¹⁵ The article for Administrative Action for Fleet Reserve/Retired Reserve Eligible Personnel states “The discretion of SECNAV to approve such transfers is absolute” and “Regardless of any recommendation by a member’s chain of command . . . SECNAV may transfer the member in current or reduced pay grade, or deny transfer to the Fleet Reserve as deemed appropriate.”¹⁶

Regardless of Appellant’s present understanding about the role of the convening authority in the endorsement of his waiver request in order to transfer to the Fleet Reserve, Appellant stated on the record that he understood his transfer to the Fleet Reserve, based on his conviction, might not be approved. When Appellant was then asked if he still wished to enter into the plea agreement, he said yes.¹⁷ Appellant has failed to show that he had any misunderstanding of a collateral consequence as a result of pleading guilty as he knew there was a possibility that his request to transfer to the Fleet Reserve may be denied. Accordingly, this assignment of error is without merit.

B. Appellant Was Not Prejudiced Under the *Strickland* test.

1. Standard of Review/Law

We review claims of ineffective assistance of counsel de novo.¹⁸ Under *Strickland*, an appellant bears the burden to demonstrate that “(a) defense counsel’s performance was deficient, and (b) this deficient performance was prejudicial.”¹⁹ The “defendant can show prejudice by demonstrating a

¹⁴ Decl. of Appellant at 2.

¹⁵ Decl. of Appellant at 2.

¹⁶ Dep’t of the Navy, *Naval Military Personnel Manual*, art. 1910-166 at 1, 2 (Nov. 11, 2021).

¹⁷ R. at 40-41.

¹⁸ *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016)).

¹⁹ *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’”²⁰

The prejudice test of ineffective assistance of counsel in the guilty plea context—whether there is a reasonable probability that, but for counsel’s errors, Appellant would have pleaded not guilty—is an objective test which we review de novo.²¹

Standing alone, an appellant’s *post hoc* assertions about how he would have pleaded but for his attorney’s deficiencies are not enough to establish prejudice. Courts must also look to contemporaneous evidence to substantiate an appellant’s expressed preference. This is so, because the appellant has an incentive to claim, in retrospect, that the result of the plea process would have been different regardless of whether that claim is, in fact, true.²²

Like the Court of Appeals for the Armed Forces in *United States v. Furth*, we resolve this case by “analyzing and applying the prejudice prong of the *Strickland* test.”²³

2. Analysis

Considering the totality of the evidence and the reasons below, we find that Appellant has not met his burden to show that he would not have pleaded guilty notwithstanding his post hoc assertions.

The negotiated plea agreement was beneficial for Appellant and provided him the opportunity to request transfer to the Fleet Reserve. Appellant’s negotiated plea agreement included: protection from a punitive discharge; an agreement from the convening authority to refer the charges to a special court-martial; an extension of Appellant’s enlistment for six months beyond the expiration of his then-current enlistment so he would continue to receive pay and allowances while in confinement²⁴ and ensure trial would not occur prior to

²⁰ *Lee v. United States*, 582 U.S. 357, 364-65 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

²¹ *Furth*, 81 M.J. at 117.

²² *Furth*, 81 M.J. at 117 (citation modified).

²³ *See Furth*, 81 M.J. at 117; *see also United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (“It is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice.”).

²⁴ R. at 44. Appellant stated in his affidavit that he incorrectly did not receive pay while in confinement.

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Appellant reaching 20 years of service.²⁵ When weighing the possibility of a contested general court-martial, longer confinement time with no pay, and the strength of the evidence which could have resulted in a punitive discharge before reaching 20 years of service, Appellant chose to create an opportunity to request to transfer to the Fleet Reserve, limit his confinement time, and eliminate the possibility of a punitive discharge. Appellant himself stated that when faced with these options as presented to him by his counsel, including the fact that transfer to the Fleet Reserve was not guaranteed, he chose to plead guilty.²⁶

The Government's case against Appellant for conspiracy to distribute a controlled substance and wrongful distribution of a controlled substance was comprehensive.²⁷ The Government's evidence included recordings of phone calls between Appellant and Ms. H and Ms. S establishing the conspiracy, images of the mail he sent to Ms. H and Ms. S. in jail, and laboratory results of the drug testing of the mail that Appellant sent to the jail for Ms. H and Ms. S to distribute to the other inmates.²⁸

While Appellant provided his evaluations and awards, as well as evidence of his allotments to his mother and to his child and one character statement, there was no persuasive evidence in extenuation and mitigation in light of the offenses to which he pleaded guilty. Appellant acknowledged in his unsworn statement to the military judge that he made the choice to commit these crimes and was "ashamed to face the fact that [he is] losing what [he] worked for."²⁹ Appellant had been in the Navy for more than 18 years at the time that he decided to conspire with his girlfriend and her friend to buy and then mail drugs to a civilian jail in order for them to distribute those drugs to other inmates. He mailed drugs to the jail several times a week between September 2020 and October 2020.³⁰ At trial, Appellant argued the loss of his retirement pay due to a reduction in pay grade as a mitigating factor, and Appellant asked

²⁵ App. Ex. I at 3. The charges against Appellant were preferred on 29 December 2021, which was seven months before Appellant's completion of 20 years of service. In the plea agreement, Appellant agreed to accept excludable delay in accordance with R.C.M. 707 from 19 January 2022 until the date of the guilty plea hearing 4 August 2022.

²⁶ Decl. of Appellant at 1-2.

²⁷ *Lee*, 582 U.S. at 367. ("Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.")

²⁸ Pros. Ex. I.

²⁹ R. at 54.

³⁰ R. at 25-26.

the military judge to recommend to the convening authority a suspension of any reduction in rank below E-5. However, the military judge did not do so.

“It is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice.”³¹ After a review of the totality of the facts and circumstances at the time Appellant entered his guilty pleas, we find there is no “reasonable probability” that Appellant would not have entered into the plea agreement with the convening authority regardless of trial defense counsel’s performance.³² Appellant has not demonstrated prejudice in this case and has not established he received ineffective assistance of counsel.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant’s substantial rights occurred.³³

The findings and sentence are **AFFIRMED**.



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

³¹ *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012). Of course, “not necessary” does not mean the same thing as prohibited, and this Court has the discretion to assess the *Strickland* prongs in either order.

³² *Furth*, 81 M.J. at 119.

³³ Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859, 866.