

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

UNITED STATES,

Appellee

v.

Joseph D. SUAREZ

Corporal (E-4)

United States Marine Corps,

Appellant

**SUPPLEMENT TO PETITION
FOR GRANT OF REVIEW**

USCA Dkt. No. 26-0303/MC

Crim. App. Dkt. No. 202300049

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

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Issues Presented

I

Did the lower court err in finding the trial defense counsel's deficient performance was not prejudicial?

II

Did the lower court comply with this Court's remand order and conduct an adequate Article 66, UCMJ, review?

Introduction

When deciding whether to accept a plea agreement, Appellant's trial defense counsel erroneously advised him (1) that a case-dispositive ruling was preserved for review on appeal and (2) that the plea agreement dismissed a registerable sex offense. In fact, the trial defense counsel negotiated additional confinement time in exchange for the government agreeing to dismiss the charge he erroneously thought required registration.

On initial review, this Court stated Appellant's assertion that the deficient advice was material to his decision to plead guilty "does not stand alone," and "the post-trial affidavits from Appellant and trial defense counsel support Appellant's claim he would not have pled guilty but for trial defense counsel's advice."¹ But on remand, without any additional evidence and without allowing Appellant to brief or

¹ *United States v. Suarez*, 86 M.J. 65, 74, 73 (C.A.A.F. 2025) [hereinafter *Suarez II*].

argue the assignment of error, the lower court decided the trial defense counsel's deficient advice was inconsequential to Appellant's decision to plead guilty. This is error, and it equates to inadequate corrective action after remand.²

Guilty pleas—a “critical stage[] of a criminal proceeding” in which the “Sixth Amendment guarantees Appellant . . . effective assistance”³—are on the rise in the military justice system.⁴ This case provides this Court an opportunity to safeguard servicemembers' right to effective assistance through this critical stage. Additionally, this case provides this Court an opportunity to give guidance regarding claims of ineffective assistance of counsel alleged in the guilty plea proceeding. Review is warranted.

Statement of Statutory Jurisdiction

This Court remanded the case to the lower court for a new review. Pursuant to Article 66(b)(1), UCMJ, the lower court conducted its review. Thus, Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

² See C.A.A.F. R. 21(b)(5)(G).

³ *Lee v. United States*, 582 U.S. 357, 364 (2017) (citation omitted).

⁴ The Military Justice Review Panel, *2024 Comprehensive Review and Assessment of the Uniform Code of Military Justice* 27, Dec. 2024, at 27, <https://www.armfor.uscourts.gov/ConfHandout/2025ConfHandout/WMHillmanOsbornEwersMJRP2024ComprehensiveAndAssessmentOfTheUCMJ4abc.pdf>.

Statement of the Case

A military judge convicted Appellant, consistent with his pleas, of wrongful use, introduction, distribution, and conspiracy to distribute controlled substances in violation of Articles 112a and 81, UCMJ.⁵ The military judge sentenced him to reduction to E-1, a dishonorable discharge, and sixty months' confinement.⁶ The convening authority approved the sentence and the military judge entered it into judgment.⁷ Initially, the lower court affirmed the findings and sentence.⁸ Thereafter, this Court set aside the lower court's decision and remanded the case for a new Article 66, UCMJ, review, providing that further factfinding was permitted.⁹

After the remand on 5 August 2025, Appellant moved the lower court to attach two declarations to the record and to permit briefing.¹⁰ It denied both motions.¹¹ On

⁵ R. at 409.

⁶ R. at 533.

⁷ Post-trial Action at 2; Entry of Judgment at 1.

⁸ *United States v. Suarez*, No. 202300049, 2024 CCA LEXIS 348 (N-M. Ct. Crim. App. Aug. 23, 2024) [hereinafter *Suarez I*].

⁹ *Suarez II*, 86 M.J. at 74.

¹⁰ *United States v. Suarez*, No. 202300049, Motion for Leave to File Brief and Assignments of Error at 1-2 (N-M. Ct. Crim. App. Feb. 13, 2026); *United States v. Suarez*, No. 202300049, Motion to Attach Declarations (Mar. 11, 2026). The motions are attached as "Appendix A" and "Appendix C" respectively.

¹¹ *United States v. Suarez*, No. 202300049, Order (N-M. Ct. Crim. App. Mar. 9, 2026) (order denying briefing); *United States v. Suarez*, No. 202300049, Order (N-M. Ct. Crim. App. March 30, 2026) (order denying Appellant's Motion to Attach). The orders are attached as "Appendix B" and "Appendix D" respectively.

28 July 2026, the lower court issued its opinion and again affirmed the findings and sentence.¹²

Statement of Facts

A. After Appellant’s battalion commander coordinated with NCIS to arrest and ridicule Appellant in front of his company, the defense moved for the dismissal of Appellant’s charges based on unlawful command influence.

At trial, the defense moved to dismiss all charges due to unlawful command influence (UCI).¹³ It filed this motion due to Appellant’s public arrest and ridicule in front of his company.¹⁴ Specifically, as he was being arrested at a company-wide brief, the battalion commander and battalion sergeant major labeled him the “drug kingpin” who was “selling cocaine in the barracks,” called him the enemy, and chastised both him and the company: “this piece of crap drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it.”¹⁵

The military judge ultimately denied the motion.¹⁶

¹² *United States v. Suarez*, No. 202300049, slip op. (N-M. Ct. Crim. App. July 28, 2026) [hereinafter *Suarez III*].

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ Appellate Ex. VIII at 10-11, 29; Appellate Ex. X at 63, 217, 239.

¹⁶ Appellate Ex. XXVII at 1-2.

B. After receiving deficient advice, Appellant agreed to plead guilty.

First, the trial defense counsel (TDC) deficiently advised Appellant that the plea agreement preserved the right to appeal the military judge's UCI ruling.¹⁷ Appellant specifically asked for and received assurance from the TDC that the plea agreement would not impact his ability to challenge the UCI ruling on appeal.¹⁸ This assurance was very important to Appellant, and he would not have pleaded guilty without the assurance.¹⁹

Second, the TDC deficiently advised Appellant that if he went to trial and was convicted of the charge of attempted prostitution, he would have to register as a sex offender.²⁰ Appellant wanted to avoid sex offender registration.²¹ To that end, the TDC negotiated a plea agreement in which the government agreed to dismiss the attempted prostitution charge, in exchange for additional confinement exposure.²² As the TDC admitted, a perceived benefit of the plea agreement was that it dismissed the perceived registerable sex offense.²³

¹⁷ Appellant's Mot. to Attach Decls., App. A at 1 [hereinafter "TDC Decl."]; *Suarez II*, 86 M.J. at 74.

¹⁸ *Id.*; Appellant's Mot. to Attach Decls., App. B at 2 [hereinafter "Appellant First Decl."]; *see also* TDC Decl. at 1 (TDC swearing "[p]rior to entering into the plea agreement, [Appellant] asked if the military judge's denial of the UCI motion would be reviewed on appeal.").

¹⁹ Appellant First Decl. at 2.

²⁰ TDC Decl. at 2; Appellant First Decl. at 2; *Suarez II*, 86 M.J. at 73.

²¹ TDC Decl. at 1.

²² TDC Decl. at 1.

²³ *Suarez II*, 86 M.J. at 74.

Wanting to avoid sex offender registration and thinking the UCI ruling would be reviewed, Appellant “reluctantly” accepted a plea agreement and pleaded guilty to the drug-related offenses.²⁴

C. The lower court initially found the TDC had provided erroneous advice that was “below the standard expected” and was deficient, but the erroneous advice was nonprejudicial.

On its initial review, the lower court found Appellant demonstrated the TDC’s “performance was deficient,” satisfying the first prong of *Strickland v. Washington*.²⁵ It was “unreasonable” for the TDC to advise Appellant that a conviction for attempted prostitution would require sex offender registration.²⁶ The lower court also found the TDC had erroneously advised Appellant that the UCI issue was preserved and not waived by virtue of the plea agreement’s “waive all waivable motions” provision.²⁷ This advice “was below the standard expected and was deficient.”²⁸

But the lower held *Strickland*’s second prong was not satisfied, concluding that Appellant was not prejudiced by the TDC’s deficient representation.²⁹

²⁴ Appellant First Decl. at 2.

²⁵ *Suarez I*, 2024 CCA LEXIS 348 at *27-29; *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁶ *Suarez I*, 2024 CCA LEXIS 348 at *25 (citing DoDI 1325.07).

²⁷ *Id.* at *29.

²⁸ *Id.*

²⁹ *Id.*

D. This Court found errors in the lower court’s analysis and set aside the decision.

This Court found “two significant errors” in the lower court’s prejudice analysis: (1) the lower court applied an incorrect prejudice standard and (2) the lower court made a “clearly erroneous” finding that “nothing in the record” demonstrates prejudice.³⁰

First, this Court found the lower court applied the incorrect prejudice standard when holding “there was no prejudice because Appellant would not have fared better absent trial defense counsel’s advice.”³¹ The correct analysis is whether Appellant “would have chosen to plead guilty in the first place.”³²

Second, this Court found Appellant’s statements, which the TDC corroborated, demonstrate evidence in the record that shows prejudice.³³ The TDC’s attestation corroborates Appellant’s attested to considerations—that the plea agreement (1) dismissed a registerable sex offense and (2) preserved review of the UCI issue, which was very important to him.³⁴ Thus, this Court concluded, “[T]he post-trial affidavits from Appellant and trial defense counsel support Appellant’s claim he would not have pled guilty but for trial defense counsel’s advice.”³⁵

³⁰ *Suarez II*, 86 M.J. at 73.

³¹ *Id.*

³² *Id.* at 74 (citation omitted).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

E. On remand, the lower court denied Appellant’s request to attach declarations to the record and to brief the court.

After this Court’s remand in August 2025, Appellant’s counsel spoke with a lower court commissioner regarding the status of the case and filing deadline.³⁶ and the commissioner informed the counsel the deadline would be communicated to him.³⁷ Without receiving further guidance on a filing deadline over the subsequent months, counsel moved the lower court to set a deadline.³⁸ It denied that motion.³⁹ Subsequently, Appellant moved the lower court to permit briefing.⁴⁰ It denied that motion too.⁴¹

Additionally, Appellant moved, pursuant to *United States v. Jessie*,⁴² to attach two declarations to the record.⁴³ Appellant averred that both declarations were relevant and necessary to resolving the ineffective assistance of counsel (IAC) assignment of error.⁴⁴ Specifically, one of the declarations, details Appellant’s

³⁶ *United States v. Suarez*, No. 202300049, Motion for Leave to File Brief and Assignments of Error at 1-2 (N-M. Ct. Crim. App. Feb. 13, 2026) (attached as “Appendix A”).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.* at 2.

⁴⁰ *Id.* at 1-2.

⁴¹ *United States v. Suarez*, No. 202300049 (N-M. Ct. Crim. App. Mar. 9, 2026) (order denying briefing) (attached as “Appendix B”).

⁴² 79 M.J. 437 (C.A.A.F. 2020).

⁴³ *United States v. Suarez*, No. 202300049, Motion to Attach Declarations (Mar. 11, 2026). (attached as “Appendix C”).

⁴⁴ *Id.* at 1-3.

decision making when deciding to plead guilty.⁴⁵ He attested that, had he known he was not charged with a registerable offense and that the plea agreement waived review of the UCI issue, he would not have pleaded guilty.⁴⁶ He further elaborated that he would not have pled guilty even though he understood that a trial could have resulted in more confinement time than the plea agreement permitted.⁴⁷

Appellant provided three examples to demonstrate his willingness to accept the additional confinement and proceed to trial.⁴⁸ First, early in the court-martial proceeding, the government counsel offered a plea agreement that would limit his confinement to two years.⁴⁹ His TDC explained to him that this deal was offered because it was early in the proceeding and that any future deals would likely require more confinement time.⁵⁰ With this understanding, Appellant rejected the plea agreement.⁵¹ Second, Appellant attested to his understanding of what would happen if he went to trial and was found guilty.⁵² He understood that a member sentence was difficult to predict and that members could levy a sentence anywhere from no confinement time to significant confinement time; a risk he was willing to accept.⁵³

⁴⁵ *Id.* at App. B [hereinafter “Appellant Second Decl.”].

⁴⁶ Appellant Second Decl.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Appellant Second Decl.

⁵³ *Id.*

Lastly, he explained his reluctance to plead guilty continued throughout the court-martial process and that it was not until the government agreed to “drop the sex offender charge in exchange for additional prison time” that he decided to accept the plea agreement.⁵⁴

The lower court denied the motion and did not consider the declaration (along with one other declaration).⁵⁵

F. On remand, the lower court again found the TDC had provided erroneous advice and was deficient, and again found the erroneous advice was nonprejudicial.

On remand, the lower court again found that the TDC was deficient by advising Appellant that the UCI ruling was preserved for review and that an attempted prostitution conviction would result in sex offender registration.⁵⁶ Further, the court found that the evidence established “Appellant desired an outcome where he did not have to register as a sex offender,” and he “also wanted to preserve UCI for appellate review.”⁵⁷ Additionally, the lower court found that the “deficient advice on both issues influenced Appellant’s decision to enter into the plea agreement.”⁵⁸

However, without ordering or accepting any additional evidence or briefing,

⁵⁴ *Id.*

⁵⁵ *United States v. Suarez*, No. 202300049 (N-M. Ct. Crim. App. March 30, 2026) (order denying Appellant’s Motion to Attach) (attached as “Appendix D”).

⁵⁶ *Suarez III*, slip op. at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

the lower court concluded that it did not “believe [the issues pertinent to the erroneous advice] were the decisive factors, since even absent these issues, Appellant had significant incentive to plead guilty pursuant to a plea agreement.”⁵⁹ Thus, the lower court held there is not a reasonable probability that, but for counsel’s errors, Appellant would have pleaded not guilty.⁶⁰

Reasons to Grant Review

- A. The lower court treated the benefit of the plea agreement as Appellant’s dispositive consideration to plead guilty, a finding incorrect in law and fact that equates to inadequate corrective action after remand.**

On remand, the lower court rejected the reasonable, corroborated, and unrefuted evidence that Appellant would not have pleaded guilty but for the deficient advice. Instead, the court gave unprecedented evidentiary value to the perceived “incentive to plead guilty,” treating the benefit of the plea agreement as case-determinative.⁶¹

1. While treating the perceived incentive to plead guilty as dispositive to Appellant’s IAC claim, the lower court failed to take adequate corrective measures.

This Court’s remand order was not simply for the lower court to apply the correct law. Although that was one error, this Court also stated, “the post-trial affidavits from Appellant and trial defense counsel support Appellant’s claim he

⁵⁹ *Id.* at 8.

⁶⁰ *Id.* at 9.

⁶¹ *Id.* at 8.

would not have pled guilty but for trial defense counsel’s advice.”⁶² Expounding, this Court provided that Appellant’s post-trial affidavit “does not stand alone” and that the record provides corroborating evidence of Appellant’s reliance on the deficient advice.⁶³ But, without statutory authority to find facts, this Court remanded the case for a new Article 66, UCMJ, review so that the lower court could address its “significant errors” and conduct an appropriate IAC analysis.⁶⁴

By focusing on the incentive to plead guilty (the cap on confinement) the lower court failed to adequately analyze whether the deficient advice was material to Appellant’s decision to plead guilty. The analysis is not whether a defendant would have been “better off going to trial” versus accepting a plea agreement, nor is it “simply the likelihood of success at trial.”⁶⁵ Instead, the analysis is of Appellant’s decision making, “which demands a case-by-case examination of the totality of the evidence.”⁶⁶ As this Court stated, “The Court ‘must look to contemporaneous evidence to substantiate an appellant’s expressed preferences.’”⁶⁷

This Court’s precedents demonstrate how the contemporaneous evidence substantiates Appellant’s assertions that the deficient advice was material to his

⁶² *Suarez II*, 86 M.J. at 74.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Lee*, 582 U.S. at 365, 367.

⁶⁶ *Id.* at 366 (citation omitted).

⁶⁷ *Suarez II*, 86 M.J. at 73 (quoting *Lee*, 582 U.S. at 369).

decision to plead guilty. As this Court's precedents show, a defendant's request for information about the effects of a plea agreement indicates the requested information is important to his decision to plead guilty.⁶⁸ And here, indisputably, Appellant asked about the preservation of the UCI ruling.⁶⁹ Additionally, while sex offender registration is a facially material consideration when deciding to plead guilty,⁷⁰ the contemporaneous evidence also shows that Appellant and the TDC discussed sex

⁶⁸ See *United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012); *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008) (collecting cases).

⁶⁹ The prospective merit of the UCI issue is additional evidence that the ruling's appealability was material to Appellant's decision. In the early stages of an investigation, the battalion commander coordinated with NCIS to arrest Appellant in front of his company. As the arrest was happening, the battalion commander denounced Appellant as a "drug kingpin" who was "selling cocaine in [his] barracks," and said he would "crush anyone that was even suspected of selling drugs in his barracks." Appellate Ex. VIII at 10, 29. As the agents escorted Appellant away, the battalion commander characterized Appellant as the enemy, remarking that the company was "letting Charlie into the wire," and stated "that should be the last of the problem." Appellate Ex. X at 63, 217, 239. The battalion sergeant major then scolded both Appellant and the company: "This piece of crap drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it." Appellate Ex. VIII at 11. Along with the evidence showing that the command leadership's action impacted Appellant's court-martial, the UCI issue was far from frivolous.

Appellant is mindful that the lower court, in dicta, found the issue lacked merit. See *Suarez III*, slip op. at 3 n.4 (finding the UCI issue was waived and, in the alternative, Appellant was not entitled to relief). But that does not change Appellant's prospective perception at the time he pleaded guilty.

⁷⁰ See *Rose*, 71 M.J. at 144 (showing sex offender registration as a "key concern" before deciding to plead guilty); *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (mandating defense counsel advisement regarding the consequences of sex offender registration).

offender registration—as the TDC attested to, it was something “[they] wanted to avoid.”⁷¹ So much so, the TDC negotiated for additional confinement in exchange for the government agreeing to dismiss the purported registerable offense⁷²—**chiefly showing confinement was not Appellant’s dispositive consideration when deciding to plead guilty.** And it was not until the government agreed to dismiss the purported registerable offense that Appellant agreed to plead guilty.⁷³

But the lower court failed to make any such specific findings based on this evidence and case law. The court failed to scrutinize the record and analyze the contemporaneous evidence that shows the deficient advice was material to Appellant’s decision to plead guilty. Instead of a “case-by-case examination of the totality of the evidence,” the lower court relied on a bare, perceived incentive to plead guilty, finding the incentive trumped the reasonable, corroborated, and unrefuted evidence that Appellant would not have pleaded guilty but for the deficient advice.⁷⁴ This is error and equates to inadequate corrective measures on remand.⁷⁵

⁷¹ *Suarez II*, 86 M.J. at 74.; Appellant First Decl. at 2 (“I did not want to risk registering as a sex offender as my defense counsel told me I would have to [if convicted of Prostitution].”).

⁷² TDC Decl. at 2.

⁷³ Appellant First Decl. at 2.

⁷⁴ *Lee*, 582 U.S. at 366 (citation omitted).

⁷⁵ *See* C.A.A.F. R. 21(b)(5)(G).

2. Neither the record nor the reality of courts-martial support the lower court's finding that the benefit of the plea agreement was Appellant's decisive factor.

Assuming, as the lower court found, the evidence was overwhelming (it was not, and the lower court failed to explain or cite to any evidence in support of its finding that the evidence was overwhelming) and that Appellant would have ultimately been convicted had he proceeded to trial, those assumptions do not make his decision to proceed to trial any less reasonable.⁷⁶ A practical, pragmatic analysis shows that it would have been reasonable for Appellant to risk additional confinement time at a contested trial.

Had Appellant been found guilty contrary to his pleas and been sentenced without the benefit of a plea agreement, he certainly could have received more confinement as contemplated by the plea agreement. But considering no mandatory minimums or guideline sentences were implicated, a member panel could have just as reasonably sentenced him to less confinement time than the plea agreement's

⁷⁶ Although a statement that Appellant was facing "91 years'" confinement, *see Suarez III*, slip op. at 7, is eye-opening, it is brazenly misleading. True, if Appellant was convicted of all the specifications, was sentenced on all of the specifications (the military judge noted that Appellant was waiving a potentially meritorious unreasonable multiplication of charges motion), was sentenced to the maximum time of confinement on all the specifications, and was sentenced to have his confinement run consecutively, he faced 91 years' confinement. But common sense dispels this misleading rationale that the lower court found outweighs Appellant's corroborated decision making.

terms.⁷⁷ Members levy unpredictable sentences, sometimes light sentences.⁷⁸

Knowledge and experience, as well as case law, show as much.⁷⁹

Had a panel convicted Appellant, the members would have proposed sentences then voted on the proposals “beginning with the least severe . . . until a

⁷⁷ This distinction between military courts-martial and Article III courts is worth noting. In Article III courts, there is a definite, objective advantage of pleading guilty. A guilty plea provides a two- or three-point deduction on a defendant’s guideline sentence, necessarily decreasing a defendant’s potential term of imprisonment. Without doubt, an Article III defendant who is found guilty at trial faces a higher prison sentence compared to a defendant who pleaded guilty.⁷⁷ But the same is not true for courts-martial. There are no guidelines. And, until recently, there generally were no mandatory minimums. At the time Appellant went to trial, members could have decided the sentence. Members could have sentenced Appellant to more time than what the plea agreement contemplated. But the panel could have just as reasonably sentenced him to less time than what was contemplated. This is all to say that plea agreements at a court-martial do not provide the definite beneficial outcome that an Article III plea agreement provides.

⁷⁸ See *United States v. McNutt*, 62 M.J. 16, 27 (C.A.A.F. 2005) (Crawford, J., concurring in part and dissenting in part) (contrasting member panel sentencing with military judge sentencing and explaining that a military judge understands the baseline sentence for a convicted charge); *United States v. Livingstone*, 78 M.J. 619, 630 (C.G. Ct. Crim. App. 2018) (Bruce, J., concurring in part and dissenting in part) (“In my experience, member sentencing is less predictable than sentencing by a military judge.”).

⁷⁹ See, e.g., *United States v. Coleman*, No. 202400173, 2025 CCA LEXIS 487, *1 (N-M. Ct. Crim. App. Oct. 30, 2025) (showing a member panel sentencing the defendant to 120 days’ confinement after finding him guilty of Articles 120, 128 and 112a, UCMJ); *United States v. Longshore*, No. 202200177, 2024 CCA LEXIS 56, *1, *8 (N-M. Ct. Crim. App. Feb. 6, 2024) (showing a member panel sentencing the defendant to ninety days’ confinement after finding him guilty of penetrating the victim’s vulva as she slept); *United States v. Davis*, 76 M.J. 224, 226 (C.A.A.F. 2017) (showing a member panel sentencing the defendant to six months’ confinement after finding him guilty of forcibly penetrating the victim’s vulva).

sentence is adopted by a concurrence”⁸⁰ The panel could have reasonably reached a concurrence well before the terms of the plea agreement. Consequently, the panel could have reasonably sentenced Appellant to less than (or significantly less than) five years’ confinement had he not waived his right to trial. And a trial would have also preserved review of the UCI ruling, preserving the possibility of the eventual dismissal of the charges.

In *Lee*, even though the defendant faced a long term of confinement and a “grim” chance of acquittal had he rejected the plea agreement, the Supreme Court found it would not be irrational to do so: “Not everyone in Lee’s position would make the choice to reject the plea. But we cannot say it would be irrational to do so.”⁸¹ Here, knowing he was not charged with a registerable offense, Appellant’s decision to risk additional confinement (as well as the possibility of receiving less confinement) while also maintaining the possibility of having his charges eventually dismissed (after raising the UCI ruling on appeal) would have been reasonable. Not everyone in Appellant’s position would have rejected the plea agreement, but “we cannot say it would be irrational to do so.”⁸²

⁸⁰ R.C.M. 1006(d)(3)(A).

⁸¹ *Lee*, 582 U.S. at 365, 371.

⁸² *Id.* at 371.

The lower court rejected the reasonable, corroborated, and unrefuted evidence that Appellant would not have pleaded guilty but for the deficient advice and reached a conclusion not supported by the record nor the law.⁸³ Review is warranted.

B. The lower court denied Appellant’s motion to attach declarations to the record, providing this Court an opportunity to give guidance regarding when information outside the record, relevant to claims of IAC, should be considered.

While assuming that less confinement time was Appellant’s dispositive consideration when deciding to plead guilty, the lower court denied Appellant the opportunity to present evidence that would have facially refuted that eventual assumption. In a declaration filed with the lower court, Appellant explained that he was willing to risk additional confinement time. As shown by his refusal to accept an initial plea agreement that limited confinement to two years, he attested that he knew future agreements would likely require additional confinement. Additionally, Appellant stated that he understood how member sentencing would be conducted and the possibility of receiving more (or less) confinement than was contemplated by the plea agreement. And he swore that he did not want to plead guilty, that he was reluctant to plead guilty throughout the court-martial proceeding, and that he decided to plead guilty after the government agreed to dismiss the charge that Appellant believed would require sex offender registration—in exchange for

⁸³ See C.A.A.F. R. 21(b)(5)(B).

additional confinement. But the lower court refused to consider this evidence, denying Appellant's motion to attach the declaration to the record.

This denial appears to be error, but this Court's precedents are not clear on the matter. This Court provides that a Court of Criminal Appeals has authority to consider information outside the record "when necessary for resolving claims of ineffective assistance of trial defense counsel. . . ."⁸⁴ More so, courts have a degree of discretion to consider necessary information outside the record.⁸⁵ But it is not clear when a court abuses that discretion by refusing to consider necessary information. More so, it is not clear how an appellant's burden to show IAC affects that analysis.⁸⁶

This case is the appropriate vehicle to resolve this unclear issue. The information that the lower court refused to consider directly undercuts the heart of the lower court's reasoning: that the benefit of the plea agreement (a limit on confinement time) was Appellant's decisive factor when deciding to plead guilty. Thus, this case presents an opportunity for this Court to determine when a Court of

⁸⁴ *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (citing *United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993)).

⁸⁵ *See United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997) (citations omitted).

⁸⁶ *See United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *Strickland*, 466 U.S. at 687) (providing it is the appellant's burden to show the deficient performance was prejudicial).

Criminal Appeals errs in denying consideration of outside information that is relevant to a claim of IAC.⁸⁷

C. This case demonstrates the need for guidance regarding when an IAC claim requires a *DuBay* hearing.

Based on a cold record, the lower court made a credibility determination. The court chose *not* to believe Appellant’s sworn statement that the deficient advice was material to his decision to plead guilty and to instead believe the limit on confinement was his decisive factor.⁸⁸ Compounding this error, the lower court made this credibility determination without ordering an evidentiary hearing. Thus, the issue of when a claim of IAC requires an evidentiary hearing is also, again, before this Court.

In *United States v. Furth*, a two-member dissent observed that credible claims of deficient guilty-plea advice should not be resolved against an appellant without an evidentiary hearing.⁸⁹ As the dissent wrote, *Lee* requires an analysis of Appellant’s state of mind,⁹⁰ and “the question of [his] state of mind . . . [is] a question of fact for the trial judge.”⁹¹ The *Furth* three-member majority acknowledged the dissent “had merit” and that the facts presented a “close question,” before ultimately

⁸⁷ See C.A.A.F. R. 21(b)(5)(A).

⁸⁸ See *Suarez III*, slip op. at 8.

⁸⁹ *Furth*, 81 M.J. at 123 (Maggs, J., dissenting) (joined by Hardy, J.).

⁹⁰ *Id.* at 125 (Maggs, J., dissenting) (joined by Hardy, J.) (citing *United States v. Cravens*, 56 M.J. 370, 375 (C.A.A.F. 2002)).

⁹¹ *Cravens*, 56 M.J. at 375.

finding, “based on the *record in this case*, . . . a *DuBay* hearing is not necessary here.”⁹²

Furthermore, courts are prohibited from making “credibility determinations on the basis of conflicting affidavits to resolve collateral claims of ineffective assistance of counsel.”⁹³ Thus, it stands to reason that courts are also prohibited from making credibility determinations that are contrary to non-conflicting, corroborative affidavits.

The lower court’s decision to make a credibility determination against Appellant without the benefit of an evidentiary hearing also conflicts with federal civilian practice. When nonfrivolous IAC claims are raised, federal courts conduct evidentiary hearings.⁹⁴ And while military courts apply the same law as the federal

⁹² *Furth*, 81 M.J. at 119 n.11 (emphasis added). The record in *Furth* provided that (1) waiting on a decision on his request for Resignation for the Good of the Service (RFGOS) before pleading guilty would have required the military judge to abate the proceedings, which would have been “highly unlikely,” and (2) appellant pleaded guilty knowing the “unlikely prospect” that his RFGOS would eventually be approved. *Id.* at 118-19. Those facts undermined the appellant’s claim that he would have rejected the plea agreement. *Id.* Similar or comparable facts are absent here.

⁹³ *Ginn*, 47 M.J. at 243 (citing *Daniels v. United States*, 54 F.3d 290, 295 (7th Cir. 1995); *Castillo v. United States*, 34 F.3d 443, 445-46 (7th Cir. 1994)).

⁹⁴ *See, e.g., United States v. Reed*, 719 F.3d 369, 373 (5th Cir. 2013) (providing that an evidentiary hearing is appropriate when the claim has an indicia of merit); *Campbell v. United States*, 686 F.3d 353, 357 (6th Cir. 2012) (providing evidentiary hearing “is required unless the record conclusively shows that the petitioner is entitled to no relief”); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (providing that an evidentiary hearing is appropriate unless the records conclusively show that the defendant is not entitled to relief).

courts when analyzing claims of deficient advice in the guilty plea stage, military courts lack the same consistent approach when determining whether an evidentiary hearing is necessary.⁹⁵ Thus, guidance is necessary.⁹⁶ And this case provides the appropriate vehicle to give such guidance.

D. The law remains unsettled whether Article 70, UCMJ, provides an appellant the right to brief and argue assignments of error on remand.

On remand, the lower court denied Appellant the opportunity to brief and argue the assignment of error. In *United States v. May*, this Court found that Article 70, UCMJ, provides an appellant the right to raise legal issues.⁹⁷ Although *May* is distinguishable since it concerned an initial Article 66, UCMJ, review and Appellant previously raised legal errors before the lower court, the case still demonstrates Appellant's right to be heard.

More like the facts here is this Court's predecessor's decision in *United States v. Collier*.⁹⁸ Although light on facts, the summary disposition provides that the Army Court of Military Review ("ACMR") failed to allow the appellant's counsel to brief and argue before the court on remand.⁹⁹ Thus, the Court of Military Appeals (CMA)

⁹⁵ See C.A.A.F. R. 21(b)(5)(C).

⁹⁶ See C.A.A.F. R. 21(b)(5)(A).

⁹⁷ *United States v. May*, 47 M.J. 478, 478 (C.A.A.F. 1998).

⁹⁸ *United States v. Collier*, 32 M.J. 48 (C.M.A. Sept. 29, 1990).

⁹⁹ *Id.*

found that the appellant was denied his right to appellate representation under Article 70, UCMJ, and set aside the ACMR's decision.¹⁰⁰ The CMA explained:

[The ACMR] acted on our mandate without allowing counsel the opportunity to brief or orally argue the issue on remand. We are not satisfied that appellant did not suffer substantial harm from this decision and we must therefore return this record to the Court of Military Review for additional proceedings in which counsel may participate.¹⁰¹

Aside from this 204-word summary disposition, this Court has never directly analyzed an appellant's rights guaranteed by Article 70, UCMJ, on remand. This case provides this Court the opportunity to do so fully, warranting review.¹⁰²

Conclusion

Appellant respectfully requests that this Court either grant review or summarily reverse the lower court and order an evidentiary hearing.



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¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See* C.A.A.F. R. 21(b)(5)(A).

Appendix

- A. *United States v. Suarez*, No. 202300049, Motion for Leave to File Brief and Assignments of Error at 1-2 (N-M. Ct. Crim. App. Feb. 13, 2026)
- B. *United States v. Suarez*, No. 202300049, Order (N-M. Ct. Crim. App. Mar. 9, 2026)
- C. *United States v. Suarez*, No. 202300049, Motion to Attach Declarations (Mar. 11, 2026)
- D. *United States v. Suarez*, No. 202300049, Order (N-M. Ct. Crim. App. March 30, 2026)
- E. *United States v. Suarez*, No. 202300049, slip op. (N-M. Ct. Crim. App. July 28, 2026)

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c) because it contains fewer than 9,000 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 this Court and opposing counsel on
October 15, 2026.



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APPENDIX A

IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES

Appellee

v.

Joseph D. SUAREZ

Corporal (E-4)

U.S. Marine Corps

Appellant

NMCCA Case No. 202300049

MOTION FOR LEAVE TO FILE BRIEF AND ASSIGNMENTS OF ERROR

Tried at Marine Corps Base Kaneohe Bay, Hawaii, on 5 May, 28 June, 26 July, 1 August, and 18 October 2022 before a General Court-Martial convened by Commanding General, 3d Marine Division, Col Melanie Mann, (arraignment), LtCol Cory Picton (motions), Col Stephen Keane (motions), and LtCol Goode (trial), USMC, Military Judges, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Appellant, by and through the undersigned counsel, respectfully moves pursuant to Rule 23.11 of this Court's Rules of Practice and Procedure for leave to file Appellant's Brief and Assignments of Error, attached to this Motion (Appendix).

On 5 August 2025, the Court of Appeals for the Armed Forces remanded the case.¹ On 11 September, undersigned counsel spoke with a panel commissioner for this Court regarding the status of the case. The commissioner told undersigned

¹ *United States v. Suarez*, No. 25-0004, 2025 CAAF LEXIS 651, __ M.J. __, at *25 (C.A.A.F. Aug. 5, 2025).

APPENDIX A

counsel that the case had been re-docketed, and this Court would notify undersigned counsel of a filing deadline. Subsequently, undersigned counsel did not receive a date to file an assignments of error brief and moved this Court for a scheduling order, requesting the Court to provide a deadline to file an assignments of error brief. On 6 January 2026, this Court denied the motion, stating that because the record is developed, further briefing is unnecessary.

Now, Appellant requests this Court to permit briefing. This request is grounded in his right to assistance of counsel and to be heard.² In *United States v. May*, the Court of Appeals for the Armed Forces found that Article 70, Uniform Code of Military Justice (UCMJ), provides an appellant the right to raise legal issues.³ Although *May* is distinguishable as Appellant previously raised legal issues, the precedent still underpins Appellant's right to be heard. He asks to be heard through being permitted to submit Brief and Assignments of Error, which is attached to this Motion. Such relief will aid this Court in reaching a decision correct in law and fact.

WHEREFORE, Appellant respectfully requests this Court grant this Motion and grant leave to file Brief and Assignments of Error.

² See *United States v. Roach*, 69 M.J. 17, 22 (C.A.A.F. 2010) (citing *United States v. Bell*, 11 C.M.A. 306 (C.M.A. 1960); *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998)).

³ *May*, 47 M.J. at 482.

APPENDIX A

Respectfully submitted,

/s/ Colin W. Hotard

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APPENDIX

Appellant's Brief and Assignments of Error

CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's filing address, uploaded into the Court's case management system, and emailed to the Director, Appellate Government Division on 13 February 2026.

/s/ Colin W. Hotard

Colin W. Hotard

Major, USMCR

Appellate Defense Counsel

Appendix B



Colin Hotard <colinwhotard@gmail.com>

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1 message

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MOTION DENIED

9 MARCH 2026

UNITED STATES NAVY-MARINE CORPS

COURT OF CRIMINAL APPEALS

Very respectfully,

Eric C. Grady

LT, JAGC, USN

Commissioner

Navy-Marine Corps Court of Criminal Appeals

O: (202) 685-8503

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UNITED STATES NAVY-MARINE CORPS

COURT OF CRIMINAL APPEALS

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To This Honorable Court:

Please see the attached motion ICO US v. Suarez.

Thank you.

--

Respectfully,

Colin W. Hotard

Cell: (504) 388-1069

Appendix C

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES,

Appellee

v.

Joseph D. SUAREZ

Corporal (E-4)

United States Marine Corps,

Appellant

NMCCA Case No. 202300049

APPELLANT’S MOTION TO ATTACH DECLARATIONS

Tried at Marine Corps Base Kaneohe Bay, Hawaii, on 5 May, 28 June, 26 July, 1 August, and 18 October 2022 before a General Court-Martial convened by Commanding General, 3d Marine Division, Col Melanie Mann, (arraignment), LtCol Cory Picton (motions), Col Stephen Keane (motions), and LtCol Goode (trial), USMC, Military Judges, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS

Appellant, through undersigned counsel, respectfully moves this Court, pursuant to Rule 23.4 of this Court’s Rules of Practice and Procedure, to attach two declarations (Appendix A and Appendix B) relevant and necessary to resolve an assignment of error.

A. The declarations are necessary and comport with *United States v. Jessie*.

In *United States v. Jessie*, the Court of Appeals for the Armed Forces declined to overrule the line of cases allowing “a CCA to accept affidavits or order a *DuBay* hearing when necessary for resolving claims of ineffective assistance of trial defense

Appendix C

counsel and a wide variety of other issues when those claims and issues are raised by the record but are not fully resolvable by the materials in the record.”¹ Here, the declarations fits squarely within this precedent as Appellant raised an assignment of error pertaining to ineffective assistance of counsel.

B. The declarations provide further evidence of Appellant’s decision making, as well as contemporaneous evidence.

Appellant has raised ineffective assistance of counsel. Whether the ineffective performance affected the outcome of the plea process depends on: (1) Appellant’s “decisionmaking” when pleading guilty and (2) the “contemporaneous evidence to substantiate” such decisionmaking.²

Appendix A is necessary because it is contemporaneous evidence relevant to dispel an argument that the trial defense counsel (TDC) conspired to assist Appellant in his claim of ineffective assistance of counsel.³ It details a 7 July 2023 conversation between undersigned counsel and the TDC. After that conversation, this Court ordered the TDC to produce an affidavit. In so doing the TDC made self-serving claims that were inconsistent with claims made during the conversation. Thus, Appendix A shows that the TDC attempted to defend his advice, and his competency, rather than provide Appellant helpful testimony.

¹ 79 M.J. 437, 442 (C.A.A.F. 2020).

² *Lee v. United States*, 582 U.S. 357, 358, 367 (2017).

³ This Court initially denied Appellant’s request to attach this declaration.

Appendix C

Appendix B further demonstrates Appellant’s decision making. It details how the erroneous advice—that the plea agreement preserved review of the litigated unlawful command influence issue and dismissed a charge that would require sex offender registration—was material to Appellant’s decision to plead guilty. Specifically, it shows that Appellant would have been willing to reject the plea agreement and, consequently, risk additional confinement had he received correct advice. Because this Court’s analysis depends in part on Appellant’s decision making, Appendix B is relevant and necessary.

WHEREFORE, Appellant respectfully requests this Court to grant this Motion and attach to the record Appendix A and Appendix B.

Respectfully Submitted.

/s/ Colin W. Hotard

Colin W. Hotard

Major, USMCR

Appellate Defense Counsel

1254 Charles Morris Street, SE

Building 58, Suite 100

Washington Navy Yard, DC 20374

Appendix: (A) LT Zoe Danielczyk, JAGC, U.S. Navy, Declaration (Apr. 12, 2024);
(B) Pvt Joseph Suarez, U.S. Marine Corps, Declaration (Mar. 9, 2026)

Appendix C

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on or about 11 March 2026.

/s/ Colin W. Hotard

Colin W. Hotard

Major, USMCR

Appellate Defense Counsel

Appendix C

IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 1

UNITED STATES,	)	DECLARATION OF
Appellee	)	LT ZOE DANIELCZYK
v.	)	
	)	Case No. 202300049
Joseph D. SUAREZ,	)	
Corporal (E-4)	)	
U.S. Marine Corps	)	
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS

I, LT Zoe Danielczyk, JAGC, USN, do hereby swear and attest that the following is true and accurate to the best of my knowledge:

1. I am currently on active duty in the U.S. Navy and serve as an appellate defense counsel at Navy and Marine Corps Appellate Review Activity (NAMARA).
2. On 7 July 2023, I was present for a telephone call between Appellant's appellate defense counsel, Maj Col Hotard, and Appellant's trial defense counsel, Capt Nicholas Rogers.
3. When discussing the agreed upon plea agreement and confinement time, Capt Rogers explained that he sought an agreement that would not require Appellant to register as a sex offender. He specifically said that "a fear of prostitution" and the fact that being convicted of attempted prostitution would require sex offender registration. When asked to elaborate, Capt Rogers explained that prostitution is "part of the DoDI" and that even a conviction of attempted prostitution would require sex offender registration.
4. I have read Capt Rogers subsequent affidavit, dated 1 April 2024. A number of the claims made in his affidavit were not made during his phone conversation. Although he attempted to quantify his advice in the affidavit by stating he only advised of the "potential" for sex offender registration and that he only sought to "limit his risk" of having to register, he did not make similar quantified representations during the phone call. Instead, he said that a conviction for attempted prostitution would require sex offender registration. Additionally, he made no representation that different states could require sex offender registration. Instead, he said the Department of Defense Instruction would require Appellant to register.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Date: 12 April 2024

Signed: Zoe R. Danielczyk
Zoe Danielczyk
LT, JAGC, U.S. Navy

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DECLARATION OF PVT JOSEPH SUAREZ, USMC

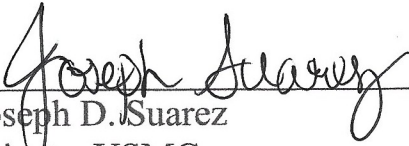
I, Joseph D. Suarez, declare that the following is true and accurate:

1. Before I agreed to plead guilty, my attorney told me I was charged with a sex offense and that the unlawful command influence motion would be reviewed on appeal. These were both very important to me. I did not want to register as a sex offender and I remember my attorney telling me, "Fives years is five years but registration is for life." Additionally, I wanted the opportunity to review the unlawful influence motion and potentially have my charges dropped. My attorney told me that Marine Corps judges rarely rule in favor of defendants for unlawful command influence but that the motion was strong and that it would have a better chance of success on appeal. With this understanding, I agreed to plead guilty to the drug charges.
2. To be clear, had I known that I was not charged with a registerable offense and that my plea agreement meant the appellate court would not review my unlawful command influence motion, I would not have pled guilty and would have gone to trial. This is true even though I may have been sentenced to a lot more than five years of prison as I was willing to serve more time. I believe my actions show I was willing to risk additional prison time.
3. First, early in my case, my attorney informed me that the prosecutor would accept a plea agreement that would limit prison to two years at most. He explained that the deal was because it was early in the case and that any future deal would require more time in prison. Knowing this would be the best plea deal, I rejected the deal.
4. Second, I understood I had two options. I could accept a plea agreement or I could go to trial. If I went to trial and was found guilty, there would be a sentencing where the members would decide my punishment. As it was explained to me, there was a wide range of punishment that was hard to predict. The members would decide from a range of no prison to years of prison. Understanding this, I was willing to go to trial and take a chance that if I was convicted my sentence would not be limited.
5. Third, my reluctance to plead guilty continued throughout the court-martial. There were numerous negotiations of a plea agreement. It was not until the prosecutor

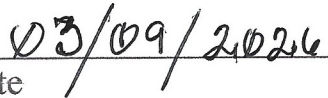
Appendix C

agreed to drop the sex offender charge in exchange for additional prison time that I agreed to accept the plea agreement.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.



Joseph D. Suarez
Private, USMC



Date

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Joseph D. SUAREZ

Corporal (E-4)

U.S. Marine Corps

Appellant

NMCCA No. 202300049

Panel 1

ORDER

*Denying Appellant's
Motion to Attach*

Appellant's case was remanded by the Court of Appeals for the Armed Forces on 5 August 2025. On 11 March 2026, Appellant filed the instant Motion to Attach. On 16 March 2026, the Government filed an opposition. We have determined that further development of the record is unnecessary. Accordingly, it is, by the Court, this 30th day of March 2026,

ORDERED:

That Appellant's Motion to Attach is **DENIED**.



FOR THE COURT:

Eric Grady

ERIC C. GRADY

Commissioner

By Direction

Copy to:

45 (Maj Hotard, LCDR Piette); 46 (LT Osborn); 02

Appendix E

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps
Court of Criminal Appeals

Before
DALY, HARRELL, and KORN
Appellate Military Judges

UNITED STATES
Appellee

v.

Joseph D. SUAREZ
Corporal (E-4), U.S. Marine Corps
Appellant

No. 202300049 (f rev)

Decided: 28 July 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary
upon further review following remand from
the United States Court of Appeals for the Armed Forces

Military Judge:
Melanie J. Mann (Arraignment)
Cory M. Picton (Motions)
Stephen F. Keane (Motions)
Andrea C. Goode (Plea)

Sentence adjudged 18 October 2022 by a general court-martial tried at Marine Corps Base Hawaii. Sentence in the Entry of Judgment: reduction to E-1, confinement for 60 months, and a dishonorable discharge.¹

¹ Appellant was credited with 280 days of pretrial confinement.

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For Appellant:

Lieutenant Colonel Todd Eslinger, USMC

Major Colin W. Hotard, USMC

Lieutenant Commander Alaric A. Piette, JAGC, USN

For Appellee:

Lieutenant Colonel Candace G. White, USMC

Lieutenant R. Blake Royall, JAGC, USN

Judge KORN delivered the opinion of the Court, in which Chief Judge DALY and Senior Judge HARRELL joined.

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

KORN, Judge:

A military judge sitting alone as a general court-martial convicted Appellant, pursuant to his pleas, of five specifications of wrongful use, introduction, and distribution of controlled substances in violation of Article 112a, Uniform Code of Military Justice (UCMJ), and one specification of conspiracy to distribute cocaine in violation of Article 81, UCMJ.

Appellant's case is before this Court for the second time. We previously affirmed the findings and sentence.² The Court of Appeals for the Armed Forces (CAAF) concluded that we "applied incorrect legal principles and failed to address whether there was a reasonable probability that, but for counsel's errors, Appellant would not have pleaded guilty and would have insisted on going to trial."³ The CAAF therefore set aside our decision and returned the case to the Judge Advocate General of the Navy for remand to this Court. We now again consider whether trial defense counsel's deficient performance was

² *United States v. Suarez*, No. NMCCA 202300049, 2024 CCA LEXIS 348 (N-M. Ct. Crim. App. Aug. 23, 2024) (unpublished).

³ *United States v. Suarez*, 86 M.J. 65, 74 (C.A.A.F. 2025) (citation modified).

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prejudicial. Applying the correct legal principles, we determine that it was not.⁴

I. BACKGROUND

In 2021, multiple members from Appellant's unit tested positive for drugs—primarily cocaine—on urinalysis tests. The Naval Criminal Investigative Service (NCIS) identified Appellant as the source of the drugs. Appellant then tested positive for multiple drugs on a random urinalysis test. NCIS agents eventually apprehended Appellant in front of his entire battalion during an all-hands gathering. The battalion commander, Lieutenant Colonel (LtCol) W., said to the gathered Marines, "This is who's been dealing cocaine in my barracks."⁵ Additionally, Sergeant Major (SgtMaj) C., the battalion sergeant major, told the Marines present, "this piece of s[***] drug kingpin has been selling drugs in your barracks and no one has the nut sack to say anything about it."⁶ These comments and the circumstances of Appellant's apprehension formed the basis of a defense motion to dismiss for unlawful command influence (UCI).

Following the comments made by LtCol W. and SgtMaj C., the commanding general (CG) withheld disposition authority for Appellant's case from LtCol W. Additionally, the CG initiated an investigation into LtCol W. and SgtMaj C. based on their comments about Appellant and a related Inspector General complaint. The CG ultimately removed both LtCol W. and SgtMaj C. from their positions.

NCIS's investigation into Appellant's conduct revealed significant evidence of his involvement with narcotics, to include his own use, as well as his regular introduction of drugs onto two bases and distribution of drugs to servicemembers. The investigation also uncovered evidence that Appellant attempted to prostitute himself.

Following referral of charges to a general court-martial, Appellant filed a motion to dismiss the charges based on UCI. The military judge denied the motion, finding that despite Appellant presenting some evidence of UCI, the Government had proved beyond a reasonable doubt that actual UCI did not

⁴ We also reaffirm our previous conclusions that: (1) Appellant waived any claim of unlawful command influence; (2) Appellant waived any claim that he was subjected to illegal pretrial punishment in violation of Article 13, UCMJ; and (3) even if not waived, Appellant is entitled to no relief on either ground.

⁵ R. at 69.

⁶ App. Ex. XXVII at 1.

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affect the proceedings and that apparent UCI did not place an intolerable strain on the public's perception of military justice.⁷ Nevertheless, as curative safeguards, the military judge ordered the convening authority (CA) to issue a directive encouraging members of the command to serve as witnesses in support of Appellant without any repercussions, authorized liberal defense voir dire of the members, and mandated that no member could come from Appellant's battalion.

Appellant ultimately decided to plead guilty. He signed a plea agreement requiring the CA to withdraw the charges of attempted prostitution and solicitation to distribute cocaine. The plea agreement authorized the military judge to sentence Appellant to confinement for between 24 and 60 months and required Appellant to waive all waivable motions. Appellant pleaded guilty pursuant to the plea agreement, acknowledging to the military judge his understanding of the waiver of all previously litigated motions, including the UCI motion.

On appeal, Appellant submitted a post-trial declaration, asserting that his counsel advised him that the guilty plea would not waive appellate review of UCI, and that he would not have pleaded guilty if it were not for this assurance.⁸ He asserted that his counsel further advised him that if he were convicted of attempted prostitution, he may have to register as a sex offender, and that he pleaded guilty to avoid this consequence. Appellant's trial defense counsel submitted a post-trial declaration confirming that he told Appellant the UCI issue was not waivable and was preserved for appellate review.⁹ He also submitted an affidavit confirming that he advised Appellant the attempted prostitution offense could be "considered as a sex offense" subjecting Appellant to mandatory sex offender registration.¹⁰

In our prior opinion, we reviewed Appellant's case, determining that, *inter alia*, Appellant waived the UCI issue, and although trial defense counsel's advice was deficient, he was not ineffective because Appellant suffered no prejudice.¹¹ The CAAF agreed that the UCI issue was waived, but set aside our de-

⁷ App. Ex. XXVII at 2.

⁸ Appellant's Decl. (29 Aug. 2023), Appellant's Mot. to Attach (22 Sep. 2023), App'x B.

⁹ Decl. of Trial Defense Counsel (25 Aug. 2023), Appellant's Mot. to Attach (22 Sep. 2023), App'x A.

¹⁰ Affidavit (1 Apr. 2024), App'x to Appellee's Resp. to Order to Produce Decl.

¹¹ *Suarez*, 2024 CCA LEXIS 348.

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cision and returned the case so we could apply correct legal principles to determine whether Appellant was prejudiced by his counsel's deficient performance.¹²

II. DISCUSSION

A. Appellant suffered no prejudice from his counsel's deficient performance because there is not a reasonable probability that, but for counsel's errors, Appellant would have pleaded not guilty.

1. Standard of Review

Appellate courts review ineffective assistance of counsel (IAC) claims de novo.¹³ The Sixth Amendment entitles criminal defendants to representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms."¹⁴ In order to prevail on a claim of IAC, an appellant must demonstrate both that counsel's performance was deficient, and that the deficiency resulted in prejudice.¹⁵ In order to show prejudice, an appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁶ "That requires a substantial, not just conceivable, likelihood of a different result."¹⁷

"When an appellant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain."¹⁸ Instead, "the appellant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."¹⁹ This is an objective test which we review de novo.²⁰

¹² *Suarez*, 86 M.J. at 65.

¹³ *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016)).

¹⁴ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹⁵ *Strickland*, 466 U.S. at 678, 682–685.

¹⁶ *Strickland*, 466 U.S. at 694.

¹⁷ *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (citation modified).

¹⁸ *Lee v. United States*, 582 U.S. 357, 364 (2017) (citation modified).

¹⁹ *Id.* at 364–65 (citation modified); see also *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021); *Denedo v. United States*, 66 M.J. 114, 128 (C.A.A.F. 2008).

²⁰ *Furth*, 81 M.J. at 117.

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2. Analysis

In our initial review of Appellant’s case, we found that counsel was deficient by advising Appellant that his guilty plea would not waive the UCI issue and that a conviction for attempted prostitution could require sex offender registration.²¹ We reaffirm those findings here and turn to the second prong of the IAC analysis to review whether those deficiencies resulted in prejudice.

Appellant’s post-trial declaration avows that he would not have pleaded guilty but for his counsel’s deficient advice. However, “[s]tanding 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.”²² We must also “look to contemporaneous evidence to substantiate an appellant’s expressed preferences . . . 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.”²³ Here, Appellant’s assertions do not stand alone. Trial defense counsel’s affidavit confirms that he advised Appellant the attempted prostitution offense could be “considered as a sex offense,” subjecting Appellant to mandatory sex offender registration.²⁴ Therefore, trial defense counsel advised “that it was prudent to accept a plea agreement that would limit his risk to sex offender registration.”²⁵

Trial defense counsel also corroborated Appellant’s reliance on the advice that a guilty plea would not waive UCI, stating “Prior to entering into the plea agreement, [Appellant] asked if the military judge’s denial of the UCI motion would be reviewed on appeal. I advised [Appellant] that the UCI issue was preserved and would be reviewed.”²⁶

Appellant desired an outcome where he did not have to register as a sex offender. Appellant also wanted to preserve UCI for appellate review. Trial defense counsel’s deficient advice on both issues influenced Appellant’s deci-

²¹ *Suarez*, 2024 CCA LEXIS 348 at *18, *20. We further found, and reaffirm here, that counsel was not deficient for failing to move for credit for illegal pretrial punishment in violation of Article 13, UCMJ.

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

²³ *Id.* (citation modified).

²⁴ Affidavit (1 Apr. 2024), App’x to Appellee’s Resp. to Order to Produce Decl.

²⁵ Affidavit (1 Apr. 2024), App’x to Appellee’s Resp. to Order to Produce Decl.

²⁶ Decl. of Trial Defense Counsel (25 Aug. 2023), Appellant’s Mot. to Attach (22 Sep. 2023), App’x A.

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sion to enter into the plea agreement. It is plausible that but for counsel's deficient advice, Appellant could have negotiated a more favorable plea agreement. However, "the relevant question 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."²⁷

Appellants face a difficult burden to demonstrate a reasonable probability that they would not have pleaded guilty but for the deficient advice of counsel. In *Furth*, for example, the CAAF found that the appellant failed to meet the prejudice standard despite his counsel erroneously advising him that if his pending resignation request was approved, any court-martial proceedings would be vacated.²⁸ After the resignation request was approved, instead of vacating the conviction, the CA in *Furth* approved the adjudged findings and sentence of the court-martial. Despite finding deficient advice, the CAAF found no prejudice because, among other factors, the plea agreement was favorable, the government's case was strong, and there were no compelling extenuating or mitigating circumstances that would have led to a lower sentence.²⁹

Similar factors exist in Appellant's case. The evidence against Appellant was overwhelming, consisting of significant information from a variety of sources. The evidence demonstrated that Appellant spearheaded a brazen and conspicuous operation of dealing illegal narcotics to other servicemembers on base. Because of the extent of the charged misconduct, Appellant's plea agreement was highly favorable. The maximum potential confinement for the referred charges was 91 years. The plea agreement withdrew the attempted prostitution and solicitation to distribute cocaine charges and limited the potential confinement to a range of 24 to 60 months.³⁰ Therefore, by pleading guilty, Appellant avoided the potential of an additional 86 to 89 years of confinement. And finally, "the record reflects no compelling extenuating or mitigating circumstances in this case that would have resulted in a reduced sentence."³¹

Avoiding the possibility of sex offender registration and preserving appellate review of the UCI motion certainly factored into Appellant's decision to

²⁷ *Suarez*, 86 M.J. at 74 (citing *Lee*, 582 U.S. at 364).

²⁸ 81 M.J. at 114.

²⁹ See also *United States v. Bradley* 71 M.J. 13 (C.A.A.F. 2012) (finding that the Government's case was strong, and the plea agreement allowed the appellant to avoid a possible life sentence).

³⁰ The plea agreement required the military judge to sentence Appellant to a dishonorable discharge and reduction to E-1.

³¹ *Furth*, 81 M.J. at 117.

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plead guilty. But we do not believe they were the decisive factors, since even absent these issues, Appellant had significant incentive to plead guilty pursuant to a plea agreement.

Appellant's case is distinguishable from those where courts found a reasonable probability that an appellant would not have pleaded guilty but for the deficient advice of counsel. Those cases involved counsel wrongly advising that an undesirable consequence would *not* ensue from the guilty plea. In *Lee v. United States*, for example, the appellant's primary concern in deciding whether to plead guilty was avoiding deportation.³² The defense counsel in *Lee* erroneously advised that a guilty plea would not result in deportation proceedings.³³ When the appellant found himself subject to mandatory deportation because of his conviction, he appealed, claiming IAC. The Supreme Court found, "[t]here is no question that deportation was the determinative issue in [the appellant's] decision whether to accept the plea deal,"³⁴ as "[the appellant] asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both [the appellant] and his attorney testified at the evidentiary hearing below that [the appellant] would have gone to trial if he had known about the deportation consequences."³⁵ The Supreme Court therefore held that there was a reasonable probability that the appellant would have pleaded not guilty to retain the possibility of avoiding deportation.³⁶

Similarly, in *United States v. Rose*, the appellant's primary concern in deciding whether to plead guilty was avoiding the possibility of having to register as a sex offender.³⁷ The appellant agreed to plead guilty to some of the charges against him because his counsel erroneously assured him that he would not have to register based on his convictions. The appellant had communicated his concern about the possibility of sex offender registration to his counsel multiple times, received inaccurate advice about whether he would have to register, and testified that he would not have pleaded guilty had he known he would have to register. The CAAF found, therefore, that the appellant had demonstrated prejudice because there was a reasonable probability that he would have

³² 582 U.S. at 361.

³³ *Id.*

³⁴ *Id.* at 369 (citation modified).

³⁵ *Id.*

³⁶ *Id.* at 371.

³⁷ 71 M.J. 138 (C.A.A.F. 2012).

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pleaded not guilty to seek the possibility of an acquittal and avoiding sex offender registration.³⁸

While there was a reasonable probability that the appellants in *Lee* and *Rose* would not have pleaded guilty but for the deficient advice of counsel, we cannot say the same about Appellant. In those cases, the appellants had key concerns—avoiding deportation or sex offender registration—which were the determinative factors in deciding whether to plead guilty. Accurate advice—that a guilty plea would result in the undesired outcome—would therefore have resulted in pleas of not guilty. No such situation existed in Appellant’s case. Although he received erroneous advice on whether a conviction for attempted prostitution would require sex offender registration, unlike in *Lee* and *Rose*, his guilty plea did not result in the outcome he wanted to avoid. Additionally, although he erroneously believed his meritless UCI claim was preserved for appellate review, we do not believe that Appellant would have pleaded not guilty if properly advised that the UCI issue was waived.³⁹ That is because Appellant’s guilty plea provided significant sentence protection in the face of an overwhelming Government case. We therefore conclude that there is not a reasonable probability that, but for counsel’s errors, Appellant would have pleaded not guilty.

³⁸ *Id.* at 144.

³⁹ In *Bradley*, the CAAF found that the appellant failed to demonstrate a reasonable probability that he would not have pleaded guilty despite his counsel erroneously advising him that a motion to disqualify trial counsel would be preserved for appeal even if the appellant pleaded guilty. 71 M.J. at 13. The CAAF found that this advice was deficient but found no prejudice in part because, “When an appellant argues that counsel was ineffective for erroneously waiving a motion, it makes sense to deny the claim if the appellant would not be entitled to relief on the erroneously waived motion, because the accused cannot show he was harmed by not preserving the issue.” *Id.* at 17. We reaffirm our determination from our previous review of Appellant’s case that “while some evidence of UCI existed, the Government proved beyond a reasonable doubt that the UCI did not affect the proceedings.” *Suarez*, 2024 CCA LEXIS 348 at *29. Therefore, because Appellant would not be entitled to relief on the erroneously waived motion, he cannot show he was harmed by not preserving the issue.

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III. CONCLUSION

After careful consideration in accordance with the CAAF's opinion, 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.⁴⁰

The findings and sentence are **AFFIRMED**.



FOR THE COURT:


MARK K. JAMISON
Clerk of Court

⁴⁰ Articles 59 & 66, UCMJ.