IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Second Lieutenant (O-1) **KEVIN M. FURTH** United States Army Appellant	)	Crim. App. Dkt. No. 20180191 USCA Dkt. No. 20-0289/AR

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

SCOTT A. MARTIN
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37052

PAUL T. SHIRK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 37224

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES / COURT OF MILITARY APPEALS CASES

SERVICE COURT CASES

STATUTES

RULES FOR COURTS-MARTIAL

REGULATIONS

OTHER MATERIALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	BRIEF ON BEHALF OF APPELLANT
Appellee	)	
	)	
v.	)	
	)	
Second Lieutenant (O-1)	)	Crim. App. Dkt. No. 20180191
KEVIN M. FURTH	)	
United States Army	)	USCA Dkt. No. 20-0289/AR
Appellant	)	

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

Issue Presented

WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS ERRONEOUSLY ADVISED THAT HIS PENDING RESIGNATION REQUEST, IF APPROVED, WOULD VACATE HIS GUILTY PLEA.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On April 18, 2018, a military judge, sitting as a general court-martial, convicted Second Lieutenant (2LT) Kevin M. Furth, pursuant to his pleas, of

AWOL and larceny, in violation of Articles 86 and 121, UCMJ, 10 U.S.C. §§ 886 and 921 (2016). (JA 9–10). The military judge sentenced 2LT Furth to be confined for a period of three months, to be reprimanded, and to be dismissed from the service. (JA 10).

Fewer than five weeks later, the Secretary of the Army's designee, the Deputy Assistant Secretary of the Army (DASA), approved 2LT Furth's resignation for the good of service (RFGOS), which 2LT Furth submitted shortly after charges were preferred against him. (JA 12, 32–33, 35). The DASA directed that the court-martial findings and sentence be vacated. (JA 35). Shortly thereafter, the Army issued 2LT Furth a DD214 with an other-than-honorable discharge resulting from his resignation. (JA 3).

On November 5, 2018, the Army Court issued its decision in *In re Vance*, 78 M.J. 631 (Army Ct. Crim. App. 2018), reiterating that the Secretary could not vacate a court-martial proceeding in light of 2014 amendments to Article 60, UCMJ, 10 U.S.C. § 860. On January 10, 2019, the convening authority approved the findings and sentence as adjudged in 2LT Furth's court-martial. (JA 15).

On May 4, 2019, the Army Court affirmed the findings. (JA 5). The Army Court approved that portion of the sentence providing for three months of confinement and a reprimand. (JA 5). The court set aside the dismissal because

2LT Furth already received a valid DD214, and the Army had no legal authority to rescind that action. (JA 5).

Second Lieutenant Furth was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, the undersigned counsel filed a Petition for Grant of Review on July 1, 2020. Contemporaneously therewith, a motion to file a separate Supplement to the Petition at a later date was filed, which this Court granted until July 27, 2020. On August 25, 2020, this Court granted 2LT Furth's Petition for Grant of Review.

Summary of Argument

Prior to 2014, the Secretary of the Army could accept an officer's resignation post-conviction and vacate the court-martial proceeding by ordering the convening authority to disapprove the findings. Army Reg. 27-10, Legal Services: Military Justice (May, 11 2016). (JA 54). In 2014, Congress amended Article 60, UCMJ. That amendment prohibited the convening authority from disapproving the court-martial findings for the charges at issue in this case, thereby leaving the Secretary with no legal means to vacate a court-martial after the fact.

Here, 2LT Furth's two trial defense counsel failed to understand this change in law. Consequently, their performance was deficient in two ways: First, 2LT Furth was repeatedly and incorrectly advised by his trial defense counsel that pleading guilty would not affect the DASA's ability to vacate his conviction, thus

depriving 2LT Furth of the ability to make a knowing and intelligent decision regarding his guilty plea and its effects. Second, 2LT Furth's trial defense counsel failed to request a continuance to allow the DASA to act on the RFGOS prior to proceeding to court-martial.

Both these instances of deficient performance were prejudicial. Had trial defense counsel properly informed 2LT Furth of his options, he would not have pled guilty and this decision would not have been irrational, under the standard recently adopted in *Lee v. United States*, 137 S. Ct. 1958 (2017). Moreover, there is a reasonable probability that a continuance would have been granted, which certainly would have changed the outcome since the RFGOS was in fact approved.

Statement of Facts

Prior to pleading guilty, his trial defense counsel erroneously advised 2LT Furth that if his pending RFGOS was approved it would vacate the court-martial proceeding, and pleading guilty would not impact the processing of the RFGOS. (JA 36, 45). Based on this misunderstanding of the law, defense counsel took no action to postpone the court-martial until after a decision on the RFGOS. Had the counsel properly advised him, 2LT Furth would not have pled guilty prior to receiving a decision on the RFGOS. (JA 34).

Standard of Review

This Court reviews claims of ineffective assistance of counsel *de novo*. *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020).

Law

The Sixth Amendment guarantees the right to effective assistance of counsel at trial. *United States v. Cronic*, 466 U.S. 648, 653–56 (1984). To prevail on a claim of ineffective assistance of counsel, an appellant must show (1) that his counsel's performance was deficient and (2) that he was prejudiced by the deficiency. *Carter*, 79 M.J. at 480. While counsel's conduct is presumed reasonable, that presumption is overcome by a showing of "specific defects" in counsel's performance that were "unreasonable under prevailing professional norms." *Id.* at 480–81.

Under the "deficient performance" prong, the appellant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)). This requires appellant to show "specific defects in counsel's performance that were unreasonable under prevailing professional norms." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2009) (internal citations omitted). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency."

United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001). Further, the strategic, tactical, or other deliberate decisions of counsel must be objectively reasonable from counsel's perspective at the time of the conduct in question. *Id.*

Under the prejudice prong, appellant must demonstrate "a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Appellant need not "make an 'outcome-determinative' showing that 'counsel's deficient conduct more likely than not altered the outcome in the case.'" *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). Rather, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

In the context of a guilty plea, a defendant 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." *Lee*, 137 S. Ct. at 1965 (quoting *Hill v. Lockhart*, 474 U. S. 52, 59 (1985)) (internal quotations omitted); *see also Rose*, 71 M.J. at 143 (quoting *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

Argument

Trial defense counsels' long outdated and incorrect understanding of the law resulted in two specific deficiencies in performance. First, trial defense counsel provided erroneous advice to 2LT Furth regarding the effect of his guilty plea on his pending RFGOS, thereby denying 2LT Furth the opportunity to make a knowing and intelligent decision regarding his guilty plea and its effects. Second, trial defense counsel failed to request a continuance prior to proceeding to court-martial, thereby ensuring the DASA did not have time to act on the RFGOS.

Unlike most claims of ineffective assistance, this case involves two instances of deficient performance, each of which resulted in obvious and predictable prejudice. Had trial defense counsel not made these errors, 2LT Furth would have resigned from the military without facing court-martial. But for defense counsel's errors, 2LT Furth would have no criminal conviction, and would not have endured a term of confinement.

1. Defense Counsel Provided Erroneous Advice to 2LT Furth.

A. The Erroneous Advice Constituted Deficient Performance.

Here, counsel's lack of knowledge of the law—and the erroneous advice that flowed from that lack of knowledge—amounts to deficient performance. When determining whether performance is deficient, one set of "important guides" is the Rules of Professional Conduct. *Rose,* 71 M.J. at 143. The first substantive rule, Rule

1.1, calls for "[c]ompetent representation" including the requisite "legal knowledge" necessary for the representation. Dep't of the Army, Pam. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, para. 1.1 (June 28, 2018). Because pleading guilty is a "critical stage" of a criminal proceeding, an accused is "entitled to the effective assistance of competent counsel" before deciding how to plead. *Rose*, 71 M.J. at 143.

Competency requires an attorney to properly advise an accused on the effects of pleading guilty. Recently, the Supreme Court swiftly concluded that counsel's representation was "objectively unreasonable," and skipped straight to the prejudice analysis, where, like here, a defendant was erroneously advised on the effects of his guilty plea. *Lee*, 137 S. Ct. at 1962 .

Two recent cases at this Court provide an additional window into how a defense counsel's advice regarding a consequence of a guilty plea can be deficient. In *Rose*, this Court found deficient performance when defense counsel failed to provide an answer to the accused's question of whether his guilty plea would require him to register as a sex offender. 71 M.J. at 143–44. And in *Denedo*, this Court held that misrepresenting the consequences of a guilty plea on one's immigration status can constitute deficient performance. *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008).

Lieutenant Furth's case is analogous to *Lee*, *Rose*, and *Denedo*. Here, just as the appellants did in those cases, 2LT Furth received erroneous advice on the effect of his guilty plea from his first chair trial defense counsel:

> I advised the Appellant that his plea of guilty would not affect the processing of his RFGOS. In other words, that it could still proceed to final decision by the appropriate authority, notwithstanding his plea of guilty. I further advised him that if the RFGOS was approved, his plea of guilty, along with all other court-martial proceedings, would essentially be a nullity; set aside by the order of SECARMY, or his designee.

(JA 36). Second chair defense counsel also participated in the discussions during which 2LT Furth received this erroneous advice, yet failed to correct her co-counsel's mistake. (JA 45).

Just as in *Rose*, defense counsel could have "investigated and answered" whether 2LT Furth's plea of guilty would affect his RFGOS. *See Rose*, 71 M.J. at 143. The effect of the 2014 amendments to Article 60, UCMJ, were not shrouded in mystery. The language of the statute is plain and unambiguous. Trial defense counsel could have, had they properly undertook an investigation of the law surrounding this issue, correctly answered the question of whether appellant's guilty plea would affect his RFGOS and thereby provided competent legal counsel. Because 2LT Furth's trial defense counsel "never . . . correctly answered" this question, their performance was deficient. Thus, the first *Strickland* prong is satisfied.

B. Second Lieutenant Furth Was Prejudiced by Defense Counsel's Deficient Performance.

In a guilty plea case, an appellant establishes prejudice by showing that absent counsel's deficient performance there is a "reasonable probability" he would not have entered a guilty plea and would have insisted on going to trial. *Lee*, 137 S. Ct. at 196; *Rose*, 71 M.J. at 143.

Here, 2LT Furth made this showing. He stated, under penalty of perjury, that he would not have pled guilty prior to receiving a decision on the RFGOS had he been properly advised of the consequences. (JA 34). This assertion is admittedly made *post-hoc*, but there was no reason for 2LT Furth to make the assertion prior to his plea because he was repeatedly advised that his guilty plea would have no impact on his pending RFGOS. Even his trial defense counsel understood this fact:

> I cannot recall whether [2LT Furth] stated he would not have plead (*sic*) guilty had my advice been wrong. I doubt that he would have said that, because he took my advice as accurate; there was no occasion to climb this branch of the decision tree.

(JA 37).

Despite there being no "occasion to climb this branch of the decision tree," there is contemporaneous evidence that this issue was of central importance to 2LT Furth. *See* 71 M.J. at 143. For example, this matter was sufficiently important that it was discussed multiple times "before [Appellant] submitted the RFGOS" as well as

"again when deciding whether he would submit an [offer to plead guilty], or plead guilty at all." (JA 36).

Second chair defense counsel was not detailed to the case until after 2LT Furth submitted his offer to plead guilty, but she recalls discussing the matter with 2LT Furth as well. (JA 45). Thus, the matter was discussed at least one additional time beyond what first chair defense counsel recalls. Moreover, this issue was sufficiently important that trial defense counsel believed it necessary to discuss the issue with their supervising attorney. *Id*.

This contemporaneous evidence shows that the guilty plea's effect on the RFGOS was a prime concern and substantiates 2LT Furth's declaration that he would not have pled guilty had he been correctly advised.

Beyond showing an appellant would not have pled guilty, this Court has traditionally required appellants to further show that pleading not guilty would have been "rational" in order to demonstrate prejudice. *United States v. Bradley*, 71 M.J. 13, 17 (C.A.A.F. 2011). Rationality has turned on the strength of the parties' respective cases and the appellant's odds of prevailing at trial. *Id.*

In *Lee*, however, the Supreme Court recast the meaning of "rational." The appellant in *Lee*, like 2LT Furth, was misadvised on the consequences of his guilty plea. In Lee's case, he was told his guilty plea would not affect his immigration status. *Lee*, 137 S. Ct. at 1961. The government argued that Lee could not show

prejudice from accepting a guilty plea where his only hope at trial was an unexpected event that would lead to an acquittal. *Id*. The Supreme Court disagreed.

Lee began by noting that the appellant "had no real defense to the charge." *Id.* The court, however, held that the proper inquiry must focus on an accused's "decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Id*. Instead, the "decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." *Id*.

For Lee, pleading guilty meant "certain[]" deportation, while going to trial meant "almost certain[]" deportation. *Id.* at 1968. If Lee lost at trial, he probably would have received a slightly longer period of jail time, followed by deportation. *Id.* at 1966. This was not meaningfully different from the result of a guilty plea—a slightly shorter period of jail time followed by deportation. *Id.* at 1966. Yet even here, the Supreme Court held that it "cannot say it would be irrational" for Lee to reject the plea in his situation. *Id.* at 1969.

For 2LT Furth, the same reasoning applies, but is much stronger. Pleading guilty meant a criminal conviction was a certainty, whereas insisting on going to trial, in hopes that the RFGOS would receive favorable action in the meantime, provided some possibility of *entirely avoiding* a criminal conviction. If 2LT Furth

had gone to trial and lost[1], the difference in sentence would not have been meaningfully different. Indeed, 2LT Furth received little benefit from agreeing to plead guilty as he received a sentence of three months confinement compared to the cap of nine months offered by the convening authority. (JA 31).

Thus, as in *Lee*, one cannot say that it would have been "irrational" for 2LT Furth to insist on going to trial for the chance of receiving a favorable decision on his RFGOS prior to trial, regardless of how low his odds of acquittal at trial may have been. *See Lee*, 137 S. Ct. at 1968. For that reason, together with 2LT Furth's declaration and the contemporaneous evidence that demonstrates the importance of the RFGOS to 2LT Furth, appellant has demonstrated prejudice, and the second *Strickland* prong is satisfied.

2. Defense Counsel Failed to Seek a Continuance

A. Failure to Seek a Continuance was Deficient Performance.

Defense counsels' failure to seek a continuance also satisfies the first prong of *Stickland*. "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion [], an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018).

[1] Unlike in *Lee*, the strength of the government's case here is not well established. However, under *Lee*, even if the strength were overwhelming, it would not be outcome determinative.

In the present case, 2LT Furth need only have obtained a delay in his court-martial until action on his RFGOS, which occurred less than five weeks after his guilty plea. (JA 35). The standard for a continuance is not high. "The military judge should, upon a showing of reasonable cause, grant a continuance to any party for *as long and as often as is just*." Rule for Courts-Martial (R.C.M.) 906(b)(1) discussion (emphasis added). Had 2LT Furth's defense counsel appreciated and articulated the basis for the delay, he could have delayed 2LT Furth's guilty plea until secretarial action.

Here, 2LT Furth pled guilty only ninety-seven days after charges were preferred against him. (JA 12). His RFGOS was approved shortly thereafter, on day 131 post-preferral. (JA 35). This case moved quickly. It did not suffer from delays or prior requests for continuances. Had defense counsel appreciated and articulated the need for the delay, there is a more than strong possibility he could have delayed the court-martial the required thirty-four days until the DASA took action on the RFGOS.

B. Second Lieutenant Furth was Prejudiced by Defense Counsels' Failure to Seek a Continuance.

When the deficient performance is defense counsels' failure to make a motion, an "appellant must also demonstrate that there is a reasonable probability that the verdict would have been different" had the motion been granted. *Harpole*, 77 M.J. at 236. As discussed above, in the guilty plea context, an appellant must

also show, but for the deficient performance, there is a reasonable probability that the appellant would not have pled guilty. *Rose*, 71 M.J. at 143.

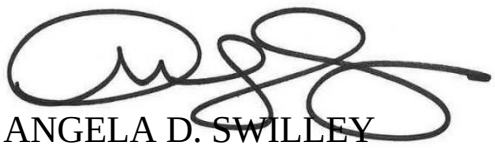
In the present case, there is no need speculate about the outcome had the continuance been granted. We know that on May 22, 2018, the DASA approved 2LT Furth's RFGOS. (JA 35). At that point, the court-martial proceedings would have been terminated, and 2LT Furth would have been administratively separated from the Army—without serving a moment of confinement time or the stigma of a criminal conviction. *Id*. Thus, prejudice is clearly established.

Conclusion

Wherefore, 2LT Furth requests that this Honorable Court find that he received constitutionally ineffective assistance of counsel and accordingly set aside and dismiss the charges and specifications.

SCOTT A. MARTIN
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37052

PAUL T. SHIRK
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 37224



ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the page limitation of Rule 24(b) because it does not exceed 30 pages, and the type-volume limitation of Rule 24(c) because it contains 3269 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

SCOTT A. MARTIN
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37052

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Furth, Crim App. Dkt. No. 20180191, USCA Dkt. No. 20-0289/AR was electronically filed brief with the Court and Government Appellate Division on September 24, 2020.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737