IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Second Lieutenant (O-1) **KEVIN M. FURTH** United States Army, Appellant	)))))))))	APPELLEE FINAL BRIEF 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:

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

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016). The statutory basis for this Court's jurisdiction is 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 alone as a general court-martial convicted appellant, in accordance with his pleas, of one specification of absence

without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886 (2016), and one specification of wrongful appropriation, in violation of Article 121, UCMJ, 10 U.S.C. § 921 (2016). (JA 9–10). The military judge sentenced appellant to be reprimanded, confined for three months, and dismissed from the service. (JA 10). On January 10, 2019, the convening authority approved the findings and sentence as adjudged. (JA 15).

On May 4, 2019, the Army Court affirmed the findings. (JA 5). The Army Court approved the portion of the sentence providing for three months' confinement and a reprimand. (JA 5). The Army Court set aside the dismissal, finding appellant had already been administratively discharged. (JA 5). Appellant petitioned this Court for review on July 1, 2020. This Court granted appellant's petition for review on August 25, 2020. *United States v. Furth*, 2020 CAAF LEXIS 481 (C.A.A.F. 2020).

Statement of Facts

Appellant entered active duty as a commissioned officer on October 25, 2014. (JA 26). After his initial training, appellant completed his first assignment at Camp Red Cloud, Korea, as a platoon leader. (JA 26). As appellant's assignment at Camp Red Cloud, Korea approached its end in the fall of 2015, appellant received orders that required him to report to the 3d Special Forces Group (3d SFG) at Fort Bragg, North Carolina on or about April 2, 2016. (JA 26–

27). Appellant's permanent change of station (PCS) orders to Fort Bragg also mandated that he attend Airborne School at Fort Benning, Georgia, en-route to his new assignment. (JA 26). According to appellant's PCS orders, he was to report to Airborne School at Fort Benning, Georgia, in a temporary duty (TDY) en-route status on March 12, 2016, and then to his permanent assignment at Fort Bragg on April 2, 2016. (JA 26). Appellant failed to sign in at either location and instead absconded to Illinois to live with his girlfriend. (JA 26–27).

On December 7, 2017, more than 21 months after his orders required him to report to Fort Benning, Georgia, and Fort Bragg, North Carolina, appellant turned himself in to the Provost Marshal's Office at Fort Bragg, North Carolina. (JA 28). During the time appellant was absent from his assigned places of duty, the Army paid him $27,112.13 in military pay and allowances to which he was not entitled because he failed to report for duty at Airborne School and the 3d SFG. (JA 29). Appellant spent nearly this entire amount even though he knew that he was not entitled to these funds. (JA 29). After spending substantially all of the money he wrongfully appropriated and finding himself with only $0.91 remaining in his bank account, appellant turned himself in to the Fort Bragg Provost Marshal's Office. (JA 28–29).

On January 11, 2018, the government charged appellant with one specification of desertion, in violation of Article 85, UCMJ, three specifications of

absence without leave (AWOL), in violation of Article 86, UCMJ, and one specification of larceny of military pay and allowances, military property of a value more than $500, in violation of Article 121, UCMJ. (JA 12–14). On January 26, 2018, appellant submitted a Resignation for the Good of the Service (RFGOS) in accordance with Army Reg. 600–8–24, Officer Transfers and Discharges (Rapid Action Revision dated September 13, 2011) [AR 600–8–24]. (JA 32–33). Appellant's entire chain of command—including the convening authority—recommended that the RFGOS be disapproved. (JA 49–52). The convening authority referred the charges against appellant to a general court-martial on February 20, 2018. (JA 14).

Appellant's defense counsel advised appellant that if his RFGOS was approved, whether before or even after the court-martial, the entire proceedings would be vacated. (JA 36). Appellant's defense counsel advised appellant that the convening authority could not take action inconsistent with the Secretary of the Army (SECARMY). (JA 36). Defense counsel further advised appellant that if his RFGOS were approved prior to the court-martial, the trial would no longer be held. (JA 36). Appellant was also informed that if his RFGOS were approved after appellant pleaded guilty, "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).

On March 21, 2018, appellant submitted an Offer to Plead Guilty (OTPG) that was ultimately approved by the convening authority. (JA 46). The convening authority approved appellant's request to plead guilty to the lesser included offenses of AWOL and wrongful appropriation and also agreed to disapprove any adjudged confinement in excess of nine months. (JA 31, 67–69). Appellant's defense counsel, based upon the government's warning, advised appellant prior to his OTPG submission that such favorable terms might not be available later if they delayed the court-martial. (JA 37). On April 18, 2018, appellant pleaded guilty, consistent with the convening authority-approved agreement, and the military judge sentenced him to be reprimanded, confined for three months, and dismissed from the service. (JA 9–10).

On May 22, 2018, five months after appellant submitted his RFGOS, the Deputy Assistant Secretary of the Army-Review Boards (DASA-RB) accepted and approved appellant's administrative discharge request. (JA 35). The DASA-RB directed the court-martial findings and sentence be vacated and appellant be administratively discharged from the service with an Under Other Than Honorable Conditions (OTH) characterization of service. (JA 35). Accordingly, appellant was issued a Department of Defense Form 214 (DD214) with an OTH characterization, which he electronically signed on June 4, 2018. (JA 3).

On January 10, 2019, the convening authority approved the adjudged court-martial sentence, which included a dismissal from the service. (JA 15). On March 5, 2019, DASA-RB rescinded the previous May 22, 2018, approval of appellant's RFGOS.[1] (JA 3). The DASA-RB subsequently voided appellant's DD214. (JA 3).

On appeal to the Army Court, appellant alleged that that his counsel were ineffective. (JA 34). Appellant stated, "[i]f I had known that pleading guilty would have prevented me from fully benefiting from an approved RFGOS, I would not have pleaded guilty prior to receiving a decision on my RFGOS." (JA 34).

Summary of Argument

Appellant is not entitled to relief because he failed to show: 1) that he would not have pleaded guilty but for the erroneous advice; and 2) that it would have been rational for him to plead not guilty. Further, appellant failed to establish that his counsel's erroneous advice had a prejudicial effect on the trial's outcome—therefore appellant's claim is without merit. *See Strickland v. Washington*, 466

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[1] In the March 5, 2019 memorandum, DASA-RB based the rescission of appellant's approved RFGOS on the amended Article 60 UCMJ, which limits the convening authority's power to vacate court-martial proceedings after adjournment. *See* Article 60(c)(3)–(c)(4), UCMJ (Indicating that a convening authority may not disapprove the findings or sentence, in whole or in part, when the court-martial issues an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.).

U.S. 668, 691 (1984); *see also United States v. Bradley,* 71 M.J. 13, 17 (C.A.A.F. 2012) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

Unsurprisingly, appellant does not claim he would have pleaded not guilty, but for his counsel's incorrect advice. Rather, appellant claims he would have pleaded guilty only *after* DASA-RB acted on his RFGOS. (JA 34). Appellant's newly asserted claim on appeal that he would have simply paused his court-martial until action on his RFGOS is untenable. It was not appellant's prerogative to delay entry of his plea at a court-martial or otherwise delay a court-martial proceeding to wait for the DASA-RB's action. Put simply, appellant had two options—plead guilty or not guilty. He opted for the former because it was in his best interest to do so. Indeed, nowhere in appellant's affidavit does he assert that if he received different advice from his defense counsel, then his decision to plead guilty would have changed.

If appellant had been correctly advised, it still would have been in his best interest and completely reasonable for him to plead guilty. Appellant agreed to plead guilty to two lesser offenses and reaped the benefit of a 9-month limit on any adjudged confinement. (JA 31). Appellant's decision to plead guilty was wise considering the government's case against him was extremely strong and included a desertion charge and larceny of over $27,000 in military property that carried a maximum of 12 years' confinement.

In sum, the erroneous advice appellant received from his defense counsel had no prejudicial effect on the outcome of appellant's court-martial. Accordingly, his claim is without merit.

Standard of Review

Claims of ineffective assistance of counsel (IAC) are reviewed de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Law

"A[n] . . . [appellant's] claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the [appellant] must show that counsel's performance was deficient. . . . Second, the [appellant] must show that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687.

Appellant must satisfy *both* components of the *Strickland* test to prevail on a claim of IAC. *Akbar*, 74 M.J. at 371 (citing *Strickland*, 466 U.S. at 687–94) (emphasis added). "[T]here is no reason for a court deciding an [IAC] claim to . . . address both components of the [test for IAC] if the [appellant] makes an insufficient showing on one." *Strickland,* 466 U.S. at 697. "If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

To prove counsel's performance was sub-standard, appellant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement." *Strickland*, 466 U.S. at 690. The court must then determine whether the acts or omissions were outside the range of professionally competent assistance. *Id.* In doing so, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* at 689, and "examine whether counsel made an objectively reasonable choice in strategy from the available alternatives." *Akbar*, 74 M.J. at 379. Such choices are analyzed from counsel's perspective at the time of the conduct in question. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

Still, counsel's performance is only ineffective to the extent that it has a prejudicial effect on the trial's outcome. *Strickland,* 466 U.S. at 691 (explaining that counsel's error may be professionally unreasonable yet still not deficient for Sixth Amendment purposes). 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*, 466 U.S. at 694). To establish prejudice in the guilty plea context, appellant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1961 (2017). To make such a showing, appellant must show that: 1) he would not have pleaded guilty but for the erroneous advice; and 2) if he had been advised properly, it would have been rational for him not to plead guilty. *See Bradley*, 71 M.J. at 17 (citing *Padilla*, 559 U.S. 356).

"[T]he convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge." Article 60(c)(4)(A), UCMJ. Similarly, the convening authority may not disapprove the findings of guilt when the adjudged sentence includes confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge. Article 60(c)(3)(B), UCMJ.

Analysis

This Court should deny appellant's request for relief because he failed to show: 1) that he would not have pleaded guilty but for the erroneous advice; and 2) that it would have been rational for him to plead not guilty. Thus, his counsel's incorrect legal advice regarding the effect of an approved RFGOS on already-adjudged findings and sentence did not have a prejudicial effect on the trial's outcome. *See Strickland*, 466 U.S. at 691; *Bradley,* 71 M.J. at 17.

Appellant's argument is predicated on a false premise that he could control the timing of his court-martial. In his affidavit, appellant does not assert that he would have pleaded not guilty but for his counsel's alleged advice regarding the effect of a RFGOS that is approved post-trial. (JA 34). Rather, appellant asserts, "[i]f I had known that pleading guilty would have prevented me from fully benefiting from an approved RFGOS, I would not have pleaded guilty *prior* to receiving a decision on my RFGOS." (JA 34) (emphasis added). Even in his newly raised claim, appellant does not contest that he would not have pleaded not guilty if advised correctly, but instead insists that he would have pleaded guilty at a *later* point in time. (JA 34) (emphasis added). Put simply, appellant presumes to have had final say over the timing of the proceedings when in fact he simply did not.

Indeed, appellant's unpersuasive desire to unilaterally delay his court-martial pending DASA-RB's decision on the RFGOS is directly at odds with Army Regulation 27–10. *See* Army Reg. 27–10, Legal Services: Military Justice, para. 5–18 (May 11, 2016) ("The tender of a receipt of approved [RFGOS] does not preclude or suspend courts-martial procedures."). Certainly, no one in appellant's chain of command recommended that the DASA-RB approve the RFGOS. Further, he was accused of serious misconduct, and the convening authority exercised his discretion and referred appellant's case to a general court-martial. At

that point, appellant had a decision to make: either go to trial without the protection of a deal or secure a plea agreement with beneficial terms and conditions. He reasonably chose the latter. Consequently, appellant's claim simply falls far short of the requirements to show prejudice in a guilty plea context. *See Lee*, 137 S. Ct. at 1961 (requiring appellant to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *see also United States v. Rose*, 71 M.J. 138, 141 (C.A.A.F. 2012). Appellant's claim for relief should be denied, and this Court's inquiry should end.

It is unsurprising that appellant, even now during his appeal and after being fully informed, does not indicate that he would plead not guilty and insist on going to trial. (JA 34). Without question, it would have been risky for appellant to plead not guilty given the totality of the circumstances he faced. Thus, the record confirms that it was objectively reasonable for appellant to plead guilty in hopes of obtaining a more favorable outcome from the court-martial. The government's case was strong, and based upon the record, it is probable that the government would have proven the charged offenses of desertion, in violation of Article 85, UCMJ, and larceny of military property of a value more than $500, in violation of Article 121, UCMJ. (JA 12–13). Appellant was away from his place of duty for a lengthy period that amounted to 21 months. (JA 20–22, 26–28). Rather than

fulfilling his military obligation to report to Fort Benning, Georgia, and Fort Bragg, North Carolina, he instead absconded halfway across the country to Illinois to be with his girlfriend, sought alternate employment, took guitar lessons, and did not return to the military until he was literally down to his last dollar. (JA 20–22, 26–28). The $27,112.13 of military pay and allowances that appellant knew he was not entitled to was included within the funds that appellant depleted almost entirely. (JA 22–24, 28–29). These facts would have easily been proven through appellant's attested bank records, which showed both his location and the fact that he spent nearly the entirety of his unauthorized pay and allowances. (JA 29; Pros. Ex. 3). In light of the severity and aggravated nature of his crimes, appellant's bargain with the convening authority was rational and eminently reasonable.

To be sure, appellant received a favorable deal. The convening authority accepted Appellant's offer to plead guilty to the lesser offenses of AWOL and wrongful appropriation. (JA 67–69). The convening authority also provided appellant with the safety net of a 9-month limitation on confinement. (JA 31). When the date of trial arrived, appellant had two options—plead guilty or not guilty.[2] Rather than try to overcome the government's strong evidence on two

[2] Appellant's trial date remained consistent after entering into the plea agreement with the convening authority. (*See* App. Ex. III). As such, absent a granted continuance, appellant's court-martial would have occurred on April 18, 2018, regardless of his plea. Appellant's insinuation that his choice of plea affected the amount of time for action on the RFGOS is without merit. (Appellant's Br. 12).

serious offenses that carried up to 12 years of confinement,[3] appellant reasonably and understandably chose to plead guilty to lesser offenses that also included the additional protection of a confinement limitation.[4] Even had appellant been

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[3] The maximum punishment includes up to 2 years' confinement for desertion and up to 10 years' confinement for larceny of military property of a value more than $500. *MCM*, 2016, App'x 12-1, 12-4. While each individual state's treatment of UCMJ offenses may vary, these offenses could be classified as felonies. *See e.g.* 18 U.S.C. § 3559(a) (classifying felony level offenses as those with a maximum punishment exceeding 1 year of confinement); *Turner v. Commonwealth*, 38 Va. App. 851, 857 (Ct. App. 2002) (holding convictions at general court-martial of UCMJ offenses with maximum punishment in excess of 1 year confinement constitute felony convictions). Larceny of a value more than $500 was specifically crafted to conform with civilian felony level offenses to ensure this treatment. *MCM*, 2016, App'x 23-17 ("The value [of $500] has also been readjusted to realign it more closely with the division between felony and misdemeanor penalties in civilian jurisdictions.") (citation omitted). Conviction of a felony offense is viewed more severely and often carries significant collateral consequences not seen in misdemeanor convictions. *See e.g. Maleng v. Cook*, 490 U.S. 488, 491–92 (1989) (per curiam) (collateral consequences of felony conviction "include the inability to vote, engage in certain businesses, hold public office, or serve as a juror") (citations and quotations omitted); *People v. Khamvongsa*, 8 Cal. App. 5th 1239, 1244 (Ct. App. 2017) ("suffering a felony conviction may result in the offender losing the right to vote, losing the right to own or possess a firearm, and if . . . convicted of a felony in the future, losing probation as a sentencing option . . . .") (internal citations omitted).

[4] The maximum punishment includes up to 1 year of confinement for AWOL in excess of 30 days and up to 6 months' confinement for wrongful appropriation. *MCM*, 2016, App'x 12-1, 12-5. As mentioned above, individual states' classification of offenses may vary, however these offenses could be classified as misdemeanors given that the maximum confinement amounts to one year or less. *See* 18 U.S.C. § 3559(a).

informed that a RFGOS would not nullify the findings of his court-martial, his choice to plead guilty would have remained the sensible option.[5]

Appellant offers no rationale to support why it would have been more reasonable for him to plead not guilty if he received accurate advice. Based upon this record, it would have been completely unreasonable for appellant to plead not guilty. Appellant knew this and acted accordingly. Indeed, appellant was correctly advised that the processing and effect of his RFGOS should not influence his decision to plead guilty or not guilty.[6] (JA 36). Accordingly, appellant's RFGOS reasonably should have had little bearing on his decision of how to plead.[7] Put

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[5] It is more plausible that the correct advice would have further incentivized appellant to plead guilty knowing that the more severe consequences would not be nullified by approval of the RFGOS.

[6] Alternatively, in the cases cited by appellant, the consequences of primary concern to the appellants directly and automatically resulted from their plea of guilty contrary to the advice they received. *See Lee*, 137 S. Ct. 1958 (appellant wrongly advised pleading guilty would not result in mandatory deportation); *Rose*, 71 M.J. 138 (appellant wrongly advised pleading guilty would not result in sex offender registration). Accordingly, the appellants in those cases would have pleaded not guilty regardless of the risk of greater punishment if correctly advised because doing so was the only way to potentially avoid the attendant consequence. *Id.* Appellant's attempt to analogize his conviction to these unforeseen consequences is misplaced. (Appellant's Br. 12–13). Appellant was fully aware that his plea of guilty carried a criminal conviction along with it. (JA 67–69). Knowing this, if appellant's primary goal was to avoid conviction, no matter the risk, appellant would have pleaded not guilty irrespective of the advice surrounding his RFGOS and taken his chances at a fully contested court-martial. Appellant's plea of guilty belies his insinuation that he wished to avoid conviction at all cost. (Appellant's Br. 12–13).

[7] The extent that the RFGOS would reasonably impact appellant's decision on how to plead was further lessened by the fact that appellant had no reason to believe

simply, appellant opted to plead guilty because it was in his best interest to do so. Similarly, it would still have been in his best interest even if he had been properly advised. Accordingly, his claim is without merit.

Having not established that if correctly advised appellant would have pleaded not guilty or that it would have been rational for him to do so, appellant turns his claim of IAC toward his counsel's alleged failure to request a continuance on his behalf.[8] (JA 34; Appellant's Br. 13–15). Appellant cannot carry "his burden to show that his counsel would have been successful if he had filed a timely motion," for a continuance. *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007). There is no required timeframe upon which the DASA-RB must act on a RFGOS.[9] *See* AR 600–8–24, para. 3-13e (JA 59); AR 27–10, para. 5–18. (JA 54). It is very unlikely that the military judge would have granted an indefinite delay on a discretionary collateral matter and ordered a continuance considering appellant's

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that his RFGOS would be approved given that his entire chain of command recommended against approval. (JA 49–52).

[8] Appellee asserts that this line of argument by appellant falls outside the granted issue as it does not relate to appellant's decision on whether or not to plead guilty. (Appellant's Br. 13–15). Accordingly, appellee asserts that it should not be considered by this Court. Appellee, however, takes this opportunity to respond to appellant in the event the Court considers this issue within the scope of the granted issue.

[9] Appellant points this Court to the fact that his RFGOS was processed "five weeks after his guilty plea." (Appellant's Br. 14). Neither appellant's counsel nor the military judge would have been able to foresee this result at the time of appellant's court-martial. Accordingly, this timeframe, based purely on hindsight, is irrelevant.

entire chain of command recommended denial of the RFGOS. (JA 49–52). The military judge signaled this position at arraignment. After being informed that the RFGOS was forwarded with a recommendation for disapproval by the convening authority, the military judge stated, "[w]e'll proceed with trial as scheduled unless or until we are told otherwise." (JA 18). Given appellant cannot show that his counsel would have likely prevailed if they filed a motion to continue, his claim is without merit. *Jameson*, 65 M.J. at 164.

It was objectively reasonable, however, for appellant's counsel to not seek a continuance. Appellant's counsel secured extremely favorable guilty plea terms, which allowed appellant to plead to two lesser offenses and leverage a 9-month confinement limitation. (JA 67–69). Appellant's counsel reasonably feared that "the benefit the Appellant received from the OTP may be reduced because of a choice to delay the court-martial." (JA 37). Accepting the offer to plead guilty was an objectively reasonable choice in strategy given that, at the time, approval of appellant's RFGOS appeared unlikely because the entire chain of command recommended disapproval. (JA 49–52). Accordingly, appellant's counsel was not ineffective for not requesting a continuance. *See Akbar*, 74 M.J. at 379.

In sum, appellant failed to establish that he would not have pleaded guilty but for his counsel's erroneous advice. Moreover, appellant suffered no prejudice following the incorrect advice he received from defense counsel. *See Lee*, 137 S.

Ct. at 1961. Appellant's suggestion that but for his plea of guilty, he would not be convicted is simply wrong. Regardless of his plea, he was going to be tried by a general court-martial, where the government was prepared to prove the serious offenses with which appellant was charged. Based upon the strength of the government's case, the likelihood of securing appellant's conviction at a contested court-martial was very high. Accordingly, appellant's prudent decision to plead guilty was rational and informed. His request for relief should be denied.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

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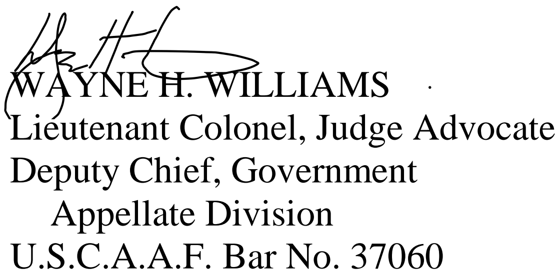

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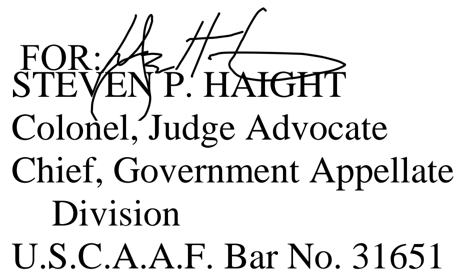

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on October _26_, 2020.

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