

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CALVIN D. GRIFFITTS  
HOSPITAL CORPSMAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201000673  
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 September 2010.  
Military Judge: CAPT Tierney Carlos, JAGC, USN.  
Convening Authority: Commander, Navy Region Europe, Africa,  
Southwest Asia, Naples, Italy.  
Staff Judge Advocate's Recommendation: CDR T.D. Stone,  
JAGC, USN.  
For Appellant: LT Michael Torrissi, JAGC, USN.  
For Appellee: LT Ritesh Srivastava, JAGC, USN.

20 October 2011

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OPINION OF THE COURT  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

CARBERRY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of six specifications of child sexual assault, one specification of assault, and one specification of possession of child pornography, violations of Articles 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 934. The military judge sentenced the appellant to eighteen years

confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. In accordance with the terms of the pretrial agreement (PTA), the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of eleven years.

On appeal, the appellant raises the following assignments of error: (1) the Government failed to comply with a material term of the PTA by not confining him at Naval Consolidated Brig Miramar (NCBM); (2) the appellant's guilty plea was improvident because the Government misrepresented the rate at which good-conduct time could be earned; and (3) trial defense counsel was ineffective in that he misinformed the appellant as to the rate at which good-conduct time could be earned.

After reviewing the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief, we are convinced that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

#### **Breach of a Material Term of the PTA**

In his first assignment of error, the appellant contends that the Government violated the terms of his PTA because the CA did not confine him at NCBM to complete the Sex Offender Treatment Program (SOTP). Instead, the appellant was sent to Fort Leavenworth, Kansas, where he remains in confinement. Appellant's Motion to Attach of 2 Mar 2011, Declaration of Appellant at 2.

The interpretation of the meaning and effect of the terms of a PTA is a question of law reviewed *de novo*. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006). The issue of PTA noncompliance is a mixed question of fact and law. *Id.* The appellant must show not only that the Government failed to comply with a term of the PTA, but that the term was material. *Id.* at 302. If the appellant makes these showings we consider an appropriate remedy - either specific performance or some other relief agreeable to the appellant. *United States v. Perron*, 58 M.J. 78, 84-86 (C.A.A.F. 2003). If we cannot find an appropriate remedy, the appellant's plea will be withdrawn and the court-martial's sentence and finding will be set aside. *Id.* at 85-86.

As an initial matter, we find that the NCBM confinement provision was a material term of the PTA. We now address whether the Government violated that term.

Paragraph (g) under the "Specially Negotiated Provisions" of the PTA states, "If I meet the qualifications and am accepted into the program, I agree to complete the Sex Offender Treatment Program [(SOTP)]. . . . Further, if awarded a sufficient amount of confinement, the government hereby [sic] agrees to place [the appellant] in the Naval Consolidated Brig, Miramar to complete the [SOTP]." Appellate Exhibit V at 5.

As the appellant points out in his brief, NCBM is a Level II confinement facility. It is not authorized to accept prisoners with sentences over five years. Bureau of Naval Personnel Inst. 5450.47B at Encl. 1 (15 Jun 2011); Department of Defense Instruction 1325.7 at 6.113.2.2 (Jul. 17, 2001). The appellant's PTA capped his confinement at eleven years and the court-martial awarded eighteen years. As such, the appellant did not meet the requirements for confinement at NCBM.

The appellant relies principally on this Court's decision in *United States v. Smead*, 60 M.J. 755 (N.M.Ct.Crim.App. 2004) to support his contention that the Government violated the PTA. In that case, we held that the Government materially breached the PTA by confining Smead at Fort Leavenworth instead of NCBM as the PTA stipulated. In *Smead*, the CA agreed to confine the appellant at NCBM if he was awarded confinement. The PTA in that case did not include any limiting or conditional language. Here, we have the provisos, "if I meet the qualifications," and "if awarded a sufficient amount of confinement." It is clear from the language in this PTA that the parties contemplated the possibility that the appellant might not be confined at NCBM. Certainly, the CA did not guarantee the appellant that he would be confined at NCBM; the CA did not have the authority to ensure the appellant would be confined there and the CA did not purport to have that authority. In light of these considerations, we distinguish this case from *Smead* and find that the Government did not materially breach the PTA.

### **Improvident Plea**

In his second assigned error, the appellant claims that his guilty pleas were improvident. The appellant argues that the reference to an outdated SECNAV Instruction in the PTA caused the appellant to misunderstand the rate at which he could earn good-time credit, i.e., ten days per month vice five days per

month. The appellant claims that his misunderstanding wrongfully induced him into entering into a PTA. We review questions concerning the providency of a plea under a *de novo* standard. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005). An appellant who challenges the providency of a guilty plea must demonstrate "a substantial basis in law or fact for questioning the guilty plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

In this assignment of error, the threshold question is whether reference to an outdated Secretary of the Navy Instruction (SECNAVINST) amounts to a "material term of the agreement." See RULE FOR COURTS-MARTIAL 910(h)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We conclude that it does not. We liken the rate at which good-conduct time may be earned to an early release program, which is considered a collateral consequence of a court-martial sentence, and not a material term of the plea. See *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). The analysis for collateral matters is different from that of material matters. In order to merit relief, the appellant must show that the collateral consequences are major and that his misunderstanding of the consequences was foreseeable and almost inexorable from the language of a pretrial agreement; was induced by the trial judge's comments during the providence inquiry; or was made readily apparent to the judge, who nonetheless failed to correct that misunderstanding. *Id.* at 267 (quoting *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982)).

In this instance, the only reference to "good time" was in the sentence limitation portion of the PTA. In that section, the appellant agreed to request "deferment for the days of 'good time' (as defined by SECNAVINST 1640.9B) that [he] may earn while in confinement . . . ." AE VI at 2. The reference to the instruction was for the limited purpose of defining good-time credit and not for the rate at which good-time credit might be earned. Furthermore, the definition of good time and the rate at which it may be earned are addressed in separate sections of the instruction. Although the reference to an outdated instruction demonstrates a lack of attention to detail by counsel, the appellant points to no difference in the two instructions as it relates to the definition for "good time." Thus, any misunderstanding the appellant may have had regarding the rate he would earn good-time credit did not stem from the language of the PTA.

Additionally, neither the text of the plea agreement nor the record of the military judge's plea inquiry contains any language that would have placed an obligation on the military judge to address the rate at which good-time credit might be earned. See *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006). Moreover, as a general matter, the military judge does not have an affirmative obligation to initiate an inquiry into early release programs as part of the plea inquiry. See *United States v. Hannan*, 17 M.J. 115, 123 (C.M.A. 1984). Accordingly, we find any misunderstanding that the appellant had regarding the rate at which good-time credit might be earned did not result from the language of the PTA, was not induced by the military judge's comments during the providence inquiry, and was not apparent to the military judge. Accordingly, the appellant's pleas were provident.

### **Ineffective Assistance of Counsel**

In his third assignment of error, the appellant asserts that his trial defense counsel was ineffective because he referenced an expired instruction and misinformed the appellant as to the rate at which good-conduct credit could be earned.

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We analyze claims of ineffective assistance of counsel under the framework established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The appellant has the burden of demonstrating that, (1) his counsel was deficient, and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his trial defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To meet the prejudice prong, the appellant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis*, 60 M.J. at 473 (citing *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004)). In a case in which the appellant pleads guilty, the appellant must show that, were it not for counsel's errors, there is a reasonable probability that he would not have pled guilty and would have instead insisted on a contested trial. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). It is not enough for the appellant to merely claim that he would have elected to plead not guilty. He must also demonstrate that his election would have been

"rational under the circumstances." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010).

In examining the appellant's claim, "we need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*.'" *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (quoting *United States v. Saintaupe*, 61 M.J. 175, 183 (C.A.A.F. 2005)). In support of his contention that he would not have pled guilty but for the defective advice of his counsel in failing to correctly inform him as to the rate at which good-time credit could be earned, the appellant submits a signed declaration. The appellant does not otherwise address why he would not have pled guilty and insisted on going to trial. Despite appellant's assertions that he would have pled not guilty, for the reasons set forth below, we conclude he has failed to demonstrate that there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.

The Government's case against the appellant was compelling and the aggravating circumstances regarding the appellant's offenses could have garnered confinement well in excess of what the military judge awarded. The Government could have called as many as six girls to testify that the appellant fondled or rubbed their breasts, buttocks or vaginas on multiple occasions between January 2008 and February 2009. At the time of the offenses the girls were all under the age of 16 and one victim was as young as 5. In addition to the victims' testimony, the appellant admitted to his senior chief that "he couldn't keep his hands off little kids . . . ." Prosecution Exhibit 4. We also note the ample evidence indicating that the appellant knowingly possessed videos and photographs of child pornography. Finally, pursuant to the PTA, the CA agreed to withdraw and dismiss 2 specifications under Article 128 and 5 specification under Article 134 to which the appellant pled not guilty. Had the appellant not entered into the PTA, the CA would not have been obliged to withdraw and dismiss the aforementioned offenses. The CA's promised action limited the appellant's criminality and his maximum period of possible confinement to 117 years. Record at 69. In light of the nature of these offenses, the evidence against the appellant, the prospect of lengthy confinement, and the appellant's desire to limit his confinement, it is not reasonably probable that the appellant would have pled not guilty and insisted on a contested trial had

he been correctly advised regarding good-time credit. We therefore reject the appellant's claim of prejudice and deny the appellant's claim of ineffective assistance of counsel.

**Conclusion**

The findings and the sentence are affirmed.

Chief Judge REISMEIER and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL  
Clerk of Court