

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

**Before
J.A. MAKSYM, R.E. BEAL, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KEIFFER T. NORDGULEN
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100278
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 22 February 2011.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding officer, 3d Battalion, 1st Marines, 1st Marine Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: Maj Rolando Sanchez, USMCR.

For Appellee: LT Benjamin Voce-Gardner, JAGC, USN.

31 October 2011

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of wrongful distribution of methylenedioxymethamphetamine (ecstasy), a Schedule I controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to 45 days confinement, reduction to pay grade E-1, forfeiture of \$970.00 pay per month for two months,

and a bad-conduct discharge. On 13 May 2011, the convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.¹

In a single assignment of error, the appellant asserts that the staff judge advocate (SJA) who reviewed the record of trial failed to inform and advise the CA of the military judge's clemency recommendation. In fact, the SJA informed the CA that "I have reviewed the record of trial and there is no clemency recommendation by the sentencing authority" We agree that this was error, but find no prejudice.

An SJA's failure to advise the CA of the sentencing authority's clemency recommendation is error. *United States v. Magnan*, 52 M.J. 56, 57 (C.A.A.F. 1999); *United States v. Clear*, 34 M.J. 129, 132 (C.M.A. 1992). Because trial defense counsel failed to object to the SJA's misstatement, we review for plain error. RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). In order to establish plain error, the appellant must demonstrate that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Even though the error may be plain or obvious, an appellant must make "some colorable showing of possible prejudice." *Id.* (citation and internal quotation marks omitted).

While the error here is plain and obvious, we find no colorable claim or evidence of possible prejudice. True, the SJA failed to include the military judge's clemency recommendation in his recommendation. However, the clemency matters submitted by the trial defense counsel detailed *verbatim* the military judge's clemency recommendation. In his action, the CA specifically states that he considered both the "record of trial" and "the matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106." Special Court-Martial Order No. 07-2011 at 2. An underlying purpose of R.C.M. 1106(d)(3) is to ensure that the CA fully considers the sentencing authority's clemency recommendation. *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999). Because the CA ultimately did consider the military judge's clemency

¹ To the extent that the convening authority's action purported to order the bad-conduct discharge executed upon completion of appellate review, it was a nullity that does not require correction. *United States v. Tarniewicz*, ___ M.J. ___, No. 201100158, 2011 CCA LEXIS 150 (N.M.Ct.Crim.App. 30 Aug 2011).

recommendation, we find that the SJA's error did not materially prejudice the appellant.

We conclude that the approved findings and 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. The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court