

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**JOHN R. DAVENPORT  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

v.

**UNITED STATES OF AMERICA**

**NMCCA 201000067**

**Review of Petition for Extraordinary Relief in the Nature of a  
Writ of Error *Coram Nobis***

**Sentence Adjudged:** 21 September 2009.

**Military Judge:** CDR Douglas Barber, JAGC, USN.

**Convening Authority:** Commanding Officer, Marine Corps  
Detachment, U.S. Army Ordnance Center & School, Aberdeen  
Proving Grounds, MD.

**Staff Judge Advocate's Recommendation:** LtCol J. Gruter,  
USMC.

**For Petitioner:** LT Daniel Napier, JAGC, USN.

**For Respondent:** LT Ritesh Srivastava, JAGC, USN.

**21 April 2011**

-----  
**OPINION OF THE COURT**  
-----

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

MITCHELL, Senior Judge:

This court is in receipt of a signed petition for extraordinary relief in the nature of a Writ of Error *Coram Nobis* offered under the All Writs Act, 28 U.S.C. § 1651(a). The petitioner avers that his defense counsel was ineffective in his representation of petitioner at trial in that he failed to fully explain the collateral consequences of his guilty pleas and

subsequent conviction for possession of child pornography. Specifically, the petitioner alleges that he was never informed by his trial defense counsel that he would have to register as a sexual predator for the rest of his life and that his conviction at a special court-martial would be considered a felony conviction in the state of Illinois. Petition of 6 Dec 2010 at 5.

### **Background**

On 21 September 2009, a military judge sitting as a special court-martial, convicted the petitioner, in accordance with his pleas, of one specification of possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.<sup>1</sup> The sentence approved by the convening authority included confinement for twelve months, reduction to pay grade E-1, and a bad-conduct discharge. The petitioner's original record of trial was submitted without assignment of error, and his conviction was affirmed by this court on 16 March 2010. *United States v. Davenport*, No. 201000067, unpublished op. (N.M.Ct.Crim.App. 16 Mar 2010).

Upon his release from confinement in July 2010, the petitioner moved back to Illinois, his home state, and learned that his special court-martial conviction for possession of child pornography is considered a felony in the State and that he would have to register as a "Sexual Predator" for the rest of his life. Petitioner's Affidavit of 3 Dec 2010 at ¶ 6. On 6 December 2010, the petitioner filed a petition for extraordinary relief with this court requesting collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a).

### **Authority to Issue Extraordinary Writs**

The All Writs Act grants all courts established by Act of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. As a court created by Act of Congress, this court has the authority to issue the writ requested in this case. *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

### **Petitioner's Claim of Ineffective Assistance of Counsel**

The petitioner's claim focuses on the advice he received from counsel prior to trial regarding the collateral consequences

---

<sup>1</sup> Pursuant to a pretrial agreement, the petitioner pleaded guilty to the charge and specification and agreed to be tried by military judge alone. In exchange, the convening authority referred the charges to a special rather than a general court-martial, thereby limiting the petitioner's punitive exposure.

of his guilty plea in Illinois in terms of sex offender registration and whether his conviction would be treated as a felony. The petitioner contends that: (1) he specifically asked his trial defense counsel how long he would have to register as a sex offender in Illinois and was told only ten years because he was a first time offender (Petitioner's Affidavit at ¶ 2) and (2) trial defense counsel advised him to plead guilty because his confinement would be capped at one year thus making his conviction a misdemeanor in civilian jurisdictions (*Id.* at ¶ 3). The petitioner now claims that had he known that he would have to register as a sexual predator for life and that his special court-martial conviction would be considered a felony in the state of Illinois, he would not have pleaded guilty. *Id.* at ¶ 8.

Trial defense counsel assert in their affidavits that their custom and practice with clients was to explain that the military justice system does not use the terms "misdemeanor" and "felony," and that States will classify courts-martial convictions in different ways. They also contend that they advised the petitioner that possession of child pornography was a "reportable offense." The trial defense counsel each state that the petitioner was "adamant" about pleading guilty and that his primary concern was limiting his period of confinement. Trial Defense Counsel Affidavits of 14 Dec 2010 (Captain [D] at 1-2 and Major [M] at 1-2).

### **Principles of Law**

The Supreme Court has noted that judgment finality "is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." *United States v. Denedo*, 129 S. Ct. 2213, 2223 (2009). Because the petitioner is asking this court to issue an extraordinary writ, he must establish a "clear and indisputable" right to the requested relief. *Denedo v. United States*, 66 M.J. 114, 126 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004)).

The Court of Appeals for the Armed Forces (CAAF) has identified standards applicable to review an ineffective assistance of counsel claim raised via a *error coram nobis* petition. *Denedo*, 66 M.J. at 126. It adopted the two-tiered evaluation used by Article III courts for *error coram nobis* review of ineffective assistance of counsel claims. *Id.* In the first tier, the petitioner must satisfy the threshold requirements for a writ of *error coram nobis*. *Id.* For purposes of this petition, we assume without deciding that the threshold requirements are satisfied in this case.

We must next conduct the second tier analysis of the ineffective assistance of counsel claim applying the principles set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

A military accused is entitled under the Constitution and Article 27(b), UCMJ, to the effective assistance of counsel. *Denedo*, 66 M.J. at 127 (citing *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987); see also Art. 38, UCMJ. An individual making a claim of ineffective assistance "must surmount a very high hurdle." *Id.* (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). Courts reviewing such a claim "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting *Strickland*, 466 U.S. at 689). The presumption of competence will not be overcome unless the accused demonstrates the following: (1) "a deficiency that is 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'; and (2) "that the accused was prejudiced by errors 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

When challenging the effectiveness of counsel in a guilty plea case, "the accused must also show specifically that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (quoting *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)) (internal quotation marks omitted). The Supreme Court, as well as several circuit courts, has made clear that the test is an objective inquiry. See *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) (describing *Hill v. Lockhart*, 474 U.S. 52 (1985) as holding that "the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial") (emphasis added); *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007), cert. denied, 554 U.S. 925 (2008); *United States v. Curry*, 494 F.3d 1124, 1131 (D.C. Cir. 2007); *Richardson v. United States*, 379 F.3d 485, 489 (7th Cir. 2004). The focus is not to be placed on the outcome of a potential trial, but rather on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Denedo*, 66 M.J. at 129 (quoting *Hill*, 474 U.S. at 59). Often in a guilty plea context, the prejudice inquiry will involve a determination of whether counsel would have made a different recommendation as to the plea had no error been committed. *United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997). "This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.* (emphasis omitted). Such predictions should be made objectively without regard for the "idiosyncrasies of the particular decisionmaker." *Id.* (quoting *Strickland*, 466 U.S. at 695).

An attorney's failure to advise an accused of potential sex offender registration requirements is not *per se* deficient performance. See *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006). Rather, it will be one factor considered when evaluating allegations of ineffective assistance. *Id.* The burden of establishing the truth of factual matters relevant to

the claim of ineffective assistance rests with the petitioner. *Denedo*, 66 M.J. at 128. When making a determination as to whether a *DuBay*<sup>2</sup> factfinding hearing is warranted in a guilty-plea case raising an ineffective assistance of counsel claim, a hearing need not be ordered if an appellate court can conclude that "the motion and the files and records of the case . . . conclusively show that [an appellant] is entitled to no relief." *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997) (citation and internal quotation marks omitted). Having reviewed the record and the submitted affidavits, we conclude, consistent with the principles announced in *Ginn*, that we can resolve the merits of the petitioner's claim of ineffective assistance of counsel without directing a fact-finding hearing. *Id.* at 244-48.

### Analysis

We find that the petitioner's trial defense counsel were not deficient in this case because they complied with applicable case law when advising the appellant about sex offender registration. There was no requirement for trial defense counsel to advise the petitioner about the specifics of a particular jurisdiction because of the peculiarities of the military justice system where cases are often tried in locations far away and separate from the state in which the accused may face collateral consequences. *Miller*, 63 M.J. at 459. The primary concern in *Miller* was to promote dialogue regarding the collateral consequences of pleading guilty and making sure that the accused has knowingly considered his plea. *Id.* Both of those aims were achieved in the case at bar when trial defense counsel explained to the petitioner that the crime to which he was pleading guilty was a reportable offense. It is also quite evident that the petitioner understood the collateral consequences of his guilty plea based upon his handwritten letter that was part of his clemency package in which he states that he will have to register as a sex offender for "a minimum of ten years." To conclude, as the petitioner avers, that he believed his term of registration was to last only ten years would require us to ignore the appellant's own handwritten statement to the contrary. Finally, it is not disputed that the petitioner was provided with an "Advice to Accused Regarding Sex Offender Registration" form that discussed federal sex offender registration requirements and mentioned DOD Instr. 1325.7, encl. 27. We find that the trial defense counsel were not deficient in their advice to the appellant about sex offender registration laws.

Even assuming *arguendo* that the petitioner's trial defense counsel did misadvise him about sex offender registration laws and whether his court-martial conviction would be treated as a felony in Illinois, we do not find any prejudice to the petitioner under the standard set forth in *Hill v. Lockhart*. Under the *Hill* test, the appellant needs to demonstrate that

---

<sup>2</sup> *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." See *Alves*, 53 M.J. at 289 (quoting *Hill*, 474 U.S. at 59).

The pretrial agreement negotiated between the petitioner and the Government included the petitioner's waiver of an Article 32 investigation and placed the forum of trial at a special court-martial, which could not impose a sentence of confinement in excess of one year or a punitive discharge more severe than a bad-conduct discharge. See Art. 19, UCMJ. The petitioner's sole consideration for entering into the pretrial agreement was that his charges were referred to a special court-martial. Appellate Exhibit II. The petitioner received the jurisdictional maximum punishment in terms of confinement and punitive discharge at his court-martial. Pleading not guilty and contesting the charges at a general court-martial would have exposed the petitioner to significantly harsher punishment and would almost certainly have led to a significantly harsher sentence if convicted. Neither course of action would have shielded the petitioner from the very harm he now claims to have desired to avoid: registration for life as a sex offender and status as a felon.

It was "well within the wide range of reasonable professional assistance" to advise the petitioner to plead guilty under these circumstances. *Strickland*, 466 U.S. at 689. We are unconvinced by the petitioner's claim that had he known specifics about sex offender and felony status in Illinois he "would have insisted on going to trial." Petitioner thus also fails to meet the additional burden levied upon him in guilty-plea cases.

### **Conclusion**

After considering the pleadings of the parties, the oral argument, and the record of trial, we conclude the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief requested. We, therefore, deny the petition.

Chief Judge REISMEIER and Judge BEAL concur.

For the Court

R.H. TROIDL  
Clerk of Court