

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

**Before
J.A. MAKSYM, F.M. MITCHELL, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTIAN I. GARCIA
SEAMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201000542
SPECIAL COURT MARTIAL**

Sentence Adjudged: 9 June 2010.

Military Judge: CAPT C. J. Gaasch, JAGC, USN

Convening Authority: Commanding Officer, Center for
Information Dominance.

For Appellant: Maj Richard D. Belliss, USMCR.

For Appellee: Capt Mark V. Balfantz, USMC

17 March 2011

OPINION OF THE COURT

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

MAKSYM, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of failure to go to an appointed place of duty, two specifications of violation of a lawful general regulation, seven specifications of wrongful use of a controlled substance, and one specification of introduction of a controlled substance onto a military installation, in violation of Articles 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 912a. The appellant was sentenced to nine months confinement, reduction to pay grade E-1, and a bad-conduct discharge. On 28 September 2010, the convening authority (CA) approved the sentence as adjudged and, with the exception of the punitive discharge, ordered the sentence executed. In accordance with the

pretrial agreement, the CA suspended execution of all confinement in excess of 140 days.

The appellant advances one assignment of error, namely that his right to fair post-trial processing of his court-martial was violated when the trial counsel gave unsolicited written advice to the CA recommending that the appellant's request for clemency be denied. We have considered the record, as well as the parties' briefs. For the reasons set out below, we set aside the CA's action and return the matter for a new post-trial processing.

Background

The appellant was sentenced on 9 June 2010. The appellant submitted a written request for clemency on 1 July 2010, in which he requested that his bad-conduct discharge be disapproved. On 4 August 2010, the trial counsel submitted a letter which was addressed directly to the CA recommending that the CA deny the appellant's request for clemency. The trial counsel asserted that no clemency was appropriate in the case for two reasons: (1) the cap on confinement in the pretrial agreement amounted to previously granted clemency; and, (2) the appellant previously had an opportunity to be administratively discharged but was referred to court martial because of "further misconduct" he committed while awaiting discharge.

The legal officer issued his recommendation (LOR) to the CA on 7 September 2010. The trial counsel's letter recommending that no clemency be granted was an enclosure to the LOR. The LOR states in paragraph 6 that post-trial matters were submitted by both the defense and the trial counsel and that the CA was "required to consider these matters in determining whether to approve or disapprove any of the findings of guilty and the action [to be taken] on the sentence." The trial defense counsel received a copy of the LOR on 8 September 2010, but failed to submit any comments on it or its enclosures. On 28 September 2010, the CA took action and determined not to grant the appellant clemency. In his action, the CA stated that before reaching his decision, he "considered . . . the recommendation of the legal officer, any addendums thereto, and all matters submitted by the defense and the accused"

Post-Trial Processing

1. Principles of Law

RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) establishes that a failure on the part of the accused to object in a timely manner to matters included in a post-trial recommendation waives later claims of error in the absence of plain error. When plain error exists in post-trial processing, a reviewing court will provide relief only when "there has been error, the error was obvious, and where the

appellant makes a colorable showing of possible prejudice." *United States v. Dedert*, 54 M.J. 904, 907 (N.M.Ct.Crim.App. 2001) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

Article 6 of the UMCJ makes clear that no person who has acted as trial counsel in any case may later act as the SJA or legal officer to a reviewing authority on the same case. 10 U.S.C. § 806(c). Other courts have interpreted Article 6 as proscribing trial counsel from preparing any legal review or making any recommendation to a CA in the post-trial process. See *United States v. Spears*, 48 M.J. 768, 774-75 (A.F.Ct.Crim.App. 1998). The rationale for preventing the trial counsel from submitting such matters is that the legal officer or SJA should be providing neutral advice to the CA free from the influence of a biased trial counsel who might prejudice the CA. See *United States v. Rice*, 33 M.J. 451, 453 (C.M.A. 1991). However, neither this court nor the Court of Appeals for the Armed Forces (CAAF) has ever held that all submissions by the trial counsel to the CA necessarily invalidate the CA's action. See generally *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383-84 (C.A.A.F. 2006); *Dedert*, 54 M.J. 907-09. Therefore, we must test for prejudice under Article 59(a), UCMJ. See *United States v. Stefan*, 69 M.H. 256, 259 (C.A.A.F. 2010). If the appellant makes a "colorable showing of possible prejudice," a reviewing court should give the appellant the "benefit of the doubt" and not speculate on what the CA would have done had trial counsel not commented. *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997). We conclude that under the specific facts the appellant has made such a showing of possible prejudice.

2. Discussion

The appellant alleges that his right to fair post-trial processing of his court-martial was violated when the trial counsel's letter was submitted to the CA because it had the effect of portraying the appellant as having committed other crimes for which the appellant was not charged. Appellant's Brief of 1 Dec 2010 at 8. We find error with the submission of the trial counsel's letter to the CA. The appellant has made a "colorable showing of possible prejudice" in this case. However, we find that it was the trial counsel's misstatement of the law concerning clemency that prejudiced the appellant, not the comment relative to the appellant going to court-martial vice being administratively separated, which might well have been a factually correct statement.

The trial counsel's statement was legally incorrect and therefore possibly misleading to the CA. Pretrial agreements are, by definition, matters that are negotiated in the pretrial phase, and the rules for such agreements are laid out within R.C.M. 705. Matters in clemency are post-trial matters to be considered after the conclusion of the court martial, and they

are governed by the 1100 series of the R.C.M. The trial counsel wrote in her letter of 4 August 2010 that the CA should approve the discharge awarded to the appellant because, as the trial counsel characterized it, the appellant "had already received clemency from . . . the convening authority through the pretrial agreement" because it placed a cap on his confinement. The trial counsel here makes the same mistake as did the staff judge advocate (SJA) in *United States v. Griffaw*, 46 M.J. 791 (A.F.Ct.Crim.App. 1997), a case heard by one of our sister courts, in which the SJA equated the CA's obligation to comply with the pretrial agreement with granting clemency. The trial counsel's statement ignores the basic difference between pretrial and post-trial matters. It also ignores the basic difference by which an accused may improve his lot in the court-martial process through those two mechanisms. When pleading guilty pursuant to a pretrial agreement, an accused must forfeit certain rights and agree to streamline the process for the CA in order to obtain the benefit of a bargain with the Government. See generally *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003) (discussing rights forfeited by accused when pleading guilty).

On the other hand, matters submitted in clemency are a distinct and vital legal privilege enjoyed by the accused by which he may throw himself at the mercy of the CA and receive what essentially amounts to a gift in the form of a sentence reduction. See *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988). The trial counsel's statement makes it appear as though the appellant in this case had already been granted mercy by the CA, when in fact the appellant and the CA had both received the benefit of their bargain in the pretrial agreement. In that agreement the appellant did in fact receive a cap on confinement, but it came at the cost of forfeiting certain rights to which he was entitled under the UCMJ and the Constitution. The trial counsel's letter was error-ridden in its legal basis and should not have been placed before the CA.

Conclusion

We set aside the CA's action and return the record to the Judge Advocate General for remand to an appropriate CA for new post-trial processing, and then return to this court for completion of appellate review.

Senior Judge MITCHELL and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court