

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

**Before
C.L. REISMEIER, F.D. MITCHELL, L.T. BOOKER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER A. OWENS
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000292
GENERAL COURT-MARTIAL**

Sentence Adjudged: 3 November 2009.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol H.D. Russell,
USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

6 January 2011

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant pursuant to his pleas of unauthorized absence and two specifications of wrongfully using a controlled substance, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, forfeiture of \$900.00 pay per month for four months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant asserts that the attorney-client relationship with his detailed trial defense counsel was terminated without good cause, leaving the appellant legally and factually without post-trial representation. The basis for the appellant's claim is that substitute counsel failed to establish an attorney-client relationship with the appellant prior to receipt of the staff judge advocate's recommendation (SJAR).

For the reasons set out below, we conclude that the 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.

Background

The appellant's guilty pleas were accepted by the military judge on 3 November 2009, pursuant to a pretrial agreement negotiated by Capt M, the appellant's trial defense counsel. On 5 January 2010, Capt M submitted a clemency request on behalf of the appellant. In the request, Capt M asked the CA to suspend the discharge, restore the appellant to duty on probation, and commute the appellant's general court-martial conviction to a special court-martial conviction. He also reserved the right to submit additional clemency matters. On 26 January 2010, the CA denied and returned the request, but noted that, once the CA had the chance to review the record of trial, the appellant could resubmit the clemency matters for reconsideration.

On 12 March 2010, facing Capt M's impending deployment, the senior defense counsel detailed substitute counsel, Capt F. The detailing letter noted that the pending deployment would prevent Capt M from "handling any post-trial matters," prompting the need for substitute counsel. On 21 April 2010, Capt F accepted delivery of the SJAR, annotating on the receipt that he did not have any comments or corrections to the SJAR. He also noted that he would not be submitting "any additional matters pursuant to R.C.M. 1105 and R.C.M. 1106, MCM (2008 Ed.)." Of critical note, Capt F hand wrote the words "any additional" on the typed form, indicating an awareness of clemency matters previously submitted. The SJAR itself stated that clemency matters were submitted on 5 January 2010, and outlined the specific request contained within the clemency request. The SJAR also noted that the 26 January 2010 denial of clemency by the CA was subject to further review of the record of trial and resubmission of clemency matters. The 5 and 26 January 2010 request and provisional denial were attached to the SJAR as enclosures (6) and (7), and were submitted to the CA.¹

¹ It is not clear from the record whether the clemency letter was never returned to Capt M or was resubmitted following return. In either case, it was submitted to the CA with the SJAR.

In his un rebutted affidavit, Capt F stated that he was detailed in anticipation of Capt M's departure. Capt F stated that during this post-trial phase, he was in touch with Capt M, and that Capt M informed him that clemency matters had already been submitted. Capt M also informed Capt F that Capt F was needed to receive the SJAR, but that no further substantive action would be required. Capt F was under the impression that the previously submitted clemency request would be reviewed by the CA in due course. Capt F stated that he made no attempt to contact the appellant, believing that his duties were "administrative in nature." The appellant, in his declaration, affirmed that Capt F never contacted him, that they never formed an attorney-client relationship, and that had they talked, he would have asked Capt F "to resubmit the clemency package to the convening authority for consideration." His claim of prejudice is that Capt F's "failure to resubmit the clemency request resulted in a lost opportunity for reconsideration by the convening authority and the potential to receive clemency." Appellants Declaration of 10 Jul 2010 at 2.

Discussion

An accused has the right to have defense counsel served with and respond to the staff judge advocate's post-trial recommendation. *United States v. Miller*, 45 M.J. 149, 150 (C.A.A.F. 1996). The appellant's two assignments of error both arise from the same claim: that he suffered prejudice at that important stage of the process.

Miller presented a scenario wherein the appellant lost the services of his detailed counsel post-trial because the counsel left active duty. *Id.* While the cause of the replacement of counsel differed from this case, the underlying facts of *Miller* are nearly identical with those of this case: detailed counsel submitted clemency on behalf of the appellant prior to his departure from the case; substitute defense counsel was detailed by competent authority; substitute defense counsel failed to contact the appellant to establish an attorney-client relationship; substitute defense counsel accepted service of the SJAR and noted neither comment nor correction; and the CA noted in his action that he considered the SJAR and the clemency request. *Miller* noted that the service of the SJAR on the substitute counsel did not comply with the requirement of RULE FOR COURTS-MARTIAL 1106(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), but that the appellant's interests were addressed by a functioning lawyer who had the legal duty to protect those interests. *Id.* at 151. As such the Court of Appeals for the Armed Forces held that the error was susceptible to testing for prejudice.²

² Even where there is a complete failure to serve an SJAR on a trial defense counsel, it is an error that is testable for prejudice. *United States v. Lowe*, 58 M.J. 261, 263 (C.A.A.F. 2003); see also *United States v. Rodriguez*,

In *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997), in the context of addressing an SJAR addendum that included "new matter," the court defined what is required to establish prejudice, noting that the appellant must "stat[e] what, if anything, would have been submitted." *Id.* at 323. Because clemency matters are so discretionary in nature, "the threshold should be low, and if an appellant makes some colorable showing of possible prejudice, [the court should] give [the] appellant the benefit of the doubt and . . . not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment." *Id.* at 323-24 (emphasis added) (internal quotation marks and citations omitted). In *United States v. Howard*, 47 M.J. 104, 107 (C.A.A.F. 1997), the court then extended this standard to cases involving the failure to serve the SJAR itself.

The letter detailing Capt F as substitute counsel provided that Capt M's impending deployment would prevent him from handling "any" post-trial matters. However, Capt M did submit a request for clemency, and Capt M was in contact with Capt F during this time frame. When Capt M actually ceased to function as the appellant's attorney is not entirely clear. However, assuming the attorney-client relationship was severed, it was done so by the senior defense counsel, after authentication of the record of trial, for good cause, in accordance with R.C.M. 1106(f)(2), MCM (2008 ed.).³ R.C.M. 1106(f)(2) specifically provides for detailing substitute counsel post-trial when the trial defense counsel has been relieved or is otherwise not reasonably available to represent an accused. These facts provide no basis on which to conclude an impermissible severance of counsel occurred.

Capt F did have an affirmative obligation pursuant to both R.C.M. 1106(f)(2) and *Miller* to form an attorney-client relationship with the appellant. He was also obliged to take further action as required to protect the interests of the appellant. The obligation to form the relationship, review the SJAR and take such action as required was not one that prospectively could be limited by what Capt F describes as Capt M's suggestion that no further action was required other than to receive the SJAR. However, *Miller* makes clear that the failures of this sort do not trigger automatic relief in the absence of prejudice. There is no colorable claim to prejudice in this case. The appellant has failed to note any deficiency in the SJAR, and his claim of prejudice is limited to a "los[t] opportunity for reconsideration by the convening authority and

60 M.J. 239, 254 (C.A.A.F. 2004) (post-trial substitution of counsel who has not formed an attorney-client relationship testable for prejudice).

³ This case does not present a situation similar to that addressed by this court in *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct.Crim.App. 2010), rev. granted, ___ M.J. ___ (C.A.A.F. June 7, 2010), a trial-level severance issue analyzed under R.C.M. 505 and 506.

the potential to receive clemency." The SJAR and subsequent CA's action refute that claim, as the SJAR forwarded the original clemency request as an enclosure, and the CA's action noted that the CA considered the SJAR as well as all matters submitted pursuant to R.C.M. 1105.

Conclusion

The findings and sentence, as approved by the convening authority below, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court