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

**Before**
**E.E. GEISER, L.T. BOOKER, J.K. CARBERRY**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ARMANDO C. GARONG**
**AVIATION STRUCTURAL MECHANIC FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200900121**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 13 January 2009.
**Military Judge:** LtCol Paul J. Ware, USMC.
**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, HI.
**Staff Judge Advocate's Recommendation:** LCDR J.M. Levy, JAGC, USN.
**For Appellant:** LT Dillon Ambrose, JAGC, USN; Capt Kyle R. Kilian, USMC.
**For Appellee:** Maj Elizabeth Harvey, USMC.

**6 October 2009**

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**OPINION OF THE COURT**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

GEISER, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of receipt of child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Members sentenced the appellant to confinement for four years and a bad-conduct discharge. The convening authority approved the adjudged sentence.

On appeal, the appellant asserts that the military judge committed plain error by admitting an affidavit from Deborah Bell, the Technical Director of Naval Consolidated Brig Miramar (hereinafter referred to as the "Bell affidavit") which stated in pertinent part that a convicted sex offender must be sentenced to confinement for 45 months or more in order to successfully complete the brig's Sex Offender Treatment Program (SOTP). In the alternative, the appellant asserts that his civilian and military trial defense counsel were ineffective for failing to object to the admission of the affidavit. The appellant also argues that his civilian trial defense counsel was ineffective for asking for a bad-conduct discharge during his sentencing argument.

**Factual Background**

From August 2006 to September 2007, the appellant used his personal computer to search for and download child pornography from the internet. Record at 52. In September 2007, agents from the Naval Criminal Investigative Service (NCIS) properly seized and analyzed the appellant's computer, discovering approximately 241 images and 37 videos of child pornography. Prosecution Exhibit 4 at 2.

At trial, the appellant pled guilty to the charged conduct. The main theme of the defense sentencing case was that the appellant was addicted to child pornography and needed/desired treatment for his addiction rather than an extended sentence to confinement. In support, the appellant called Dr. Reneau Kennedy, a forensic psychologist with extensive experience treating criminal offenders. Record at 170-71. Dr. Kennedy testified that she had evaluated the appellant and diagnosed him with an addiction to child pornography. *Id.* at 174-75.

Dr. Kennedy opined that child pornography addiction is treatable and that in her opinion the appellant had an excellent prognosis for rehabilitation if he received sex offender treatment. *Id.* at 178, 181. Absent treatment, the doctor opined that those addicted to child pornography have a greater risk of recidivism. *Id.* at 186. Dr. Kennedy went on to explain that the military does not offer any treatment programs that do not involve incarceration. *Id.* at 204. Dr. Kennedy specifically informed the members that the treatment program at Naval Consolidated Brig Miramar consists of an introductory psycho-education and assessment program that lasts 12 weeks. *Id.* at 179. She testified that, following this, for those who

qualify, there is a treatment program that lasts two years. *Id.* at 180.

Between Dr. Kennedy's direct and cross-examinations, the Government offered and entered the contested Bell affidavit into evidence. *Id.* at 189; PE 8 at 3. Trial defense counsel stated that he had no objection to the affidavit's admission. Record at 189.

The affidavit confirmed the defense expert's testimony regarding the content and length of the Miramar treatment program. PE 8 at 3. However, the affidavit also reflected Navy policy that a potential participant in the treatment program must have at least 45 months of post-trial confinement remaining in order to complete the treatment program.[1] *Id*.

Prior to trial, both parties agreed in their pretrial agreement (PTA) that the appellant would not object to the admission of the Bell affidavit during rebuttal on foundation, hearsay, authenticity or Sixth Amendment grounds. Appellate Exhibit XXVII at 5. The appellant retained his right to object based upon RULE FOR COURTS-MARTIAL 1001, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and other grounds. *Id.*

**Waiver**

While the PTA provision itself does not expressly waive objection on all grounds available, it does provide clear evidence that trial defense counsel had advance notice of the contents of the Bell affidavit. Counsel's subsequent affirmative statement that he did not object to the affidavit's admission is sufficient evidence of an intentional relinquishment of a known right. *See United States v. Campos* 67 M.J. 330 (C.A.A.F. 2009) and *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009). We, therefore, find waiver here.

**Ineffective Assistance of Counsel**

Having found waiver, we next determine whether defense counsel's waiver constituted ineffective assistance of counsel. We find that it did not.

[1] The affidavit states that a prisoner may participate in the treatment program if he receives a sentence including confinement between 28 and 45 months. Participation of prisoners with less than 45 months is only possible if the prisoner voluntarily agrees to hold their earned time and good conduct sentence credits in abeyance until successful completion of the program.

To overcome the presumption of a counsel's competence, an appellant must demonstrate (1) a "deficiency in counsel's performance that is 'so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment'"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)(quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

An appellant asserting ineffective assistance of counsel "must surmount a very high hurdle" and appellate review of a defense counsel's performance must be "highly deferential [and not] colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)(citations and internal quotation marks omitted). It is not the role of appellate courts to "'second guess the strategic or tactical decisions made at trial by defense counsel.'" *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Rather, especially in cases where an appellant is attacking his counsel's trial strategy, an appellant must show "specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)(quoting *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004)).

The appellant asserts that trial defense counsel was ineffective for not objecting to the introduction of the Bell affidavit and the trial counsel's subsequent use of the affidavit in his questioning of Dr. Kennedy and his closing argument. Appellant's Brief of 22 May 2009 at 5-6. We will focus our analysis on his defense counsel's failure to object to the admission of the Bell affidavit. Once the affidavit was properly admitted as evidence, trial counsel was entitled to use it in questioning witnesses and during argument.

Reading the Bell affidavit in the context of the strong defense focus on the appellant's need for treatment, it is likely that the members considered the administrative time requirements for treatment when they arrived at a sentence including 48 months confinement. In this regard, we note that the defense expert, Dr. Kennedy, testified that she diagnosed the appellant with an addiction to child pornography and that in her professional opinion, absent treatment, child pornographers have a greater risk of recidivism. Record at 175, 181, 186.

She further testified that the military has no outpatient sex offender treatment programs. *Id.* at 204.

Dr. Kennedy did not specifically discuss whether civilian outpatient treatment programs exist and whether such programs are, in her professional opinion, effective. Defense counsel nonetheless argued in closing that treatment can also take place in an outpatient setting. *Id.* at 275. The only actual reference in evidence to the possibility of outpatient treatment was in the contested affidavit, which stated in pertinent part that prisoners are "provided guidance to arrange a community-based treatment plan before release." PE 8 at 3. Considering the entire record, we find that references in PE-8 to specific timeframes for treatment while incarcerated were properly a consideration for the members and did not, standing alone, amount to an impermissible sentence recommendation.

We further note that even if trial defense counsel had objected to the admission of the affidavit as the appellant now claims he should have, the affidavit would have been admissible as rebuttal to the defense expert witness who specifically addressed both the nature of Navy treatment and the required time to complete such treatment. *United States v. Flynn*, 28 M.J. 218, 221-22 (C.M.A. 1989); *United States v. Lapeer*, 28 M.J. 189, 190 (C.M.A. 1989). The defense counsel's election to allow early admission of the affidavit in order to minimize the affidavit's impact on the members seems well within the ambit of reasonable tactical decision-making. Government Response to Court Order of 20 Jul 2009, Civilian Defense Counsel Affidavit at 1.

We are thus convinced that trial defense counsel represented the appellant's interests in a sound manner. We find no "deficiency in counsel's performance that is 'so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.'" *Moulton*, 47 M.J. at 229 (quoting *Strickland*, 56 U.S. at 687.).

**Request for a Bad-Conduct Discharge**

A defense counsel shall not ask for a bad-conduct discharge in contravention of his client's wishes. *United States v. Pineda*, 54 M.J. 298, 300 (C.A.A.F. 2001); *United States v. Volmar*, 15 M.J. 339, 341 (C.M.A. 1983). If a defense counsel asks for a bad-conduct discharge, the client's assent should be documented on the record. *United States v. Lyons*, 36 M.J. 425, 427 (C.M.A. 1993).

In this case, trial defense counsel has provided a signed statement from the appellant dated 13 January 2009, the day of trial. In pertinent part, it reads:

> After consultation with my counsel I have agreed that the appropriate strategy in this case is to request a punitive discharge in the form of a Bad Conduct Discharge in order to obtain a more favorable sentence on confinement.

Government Response to Court Order of 20 Jul 2009, Detailed Defense Counsel Affidavit.

In contrast, the appellant's 13 July 2009 affidavit, generated in preparation for this appeal, directly contradicts his 13 January 2009 affidavit. On appeal, the appellant asserts that:

> Had I been given an opportunity to discuss this with my counsel, I would not have wanted him to ask for a BCD, though I knew it was likely I would receive a punitive discharge. [Civilian defense counsel] told me on a number of occasions that I would likely receive a Dishonorable Discharge.

Appellant's Consent Motion to Attach of 14 Jul 2009, Appellant's Affidavit of 13 Jul 2009.

As the 13 January 2009 affidavit was generated contemporaneously with trial and the 13 July 2009 affidavit was generated in preparation for this appeal, we find the 13 January 2009 considerably more reliable.

In addition, civilian and military defense counsel both state that they had extensive conversations with the appellant prior to trial about sentencing strategy and that the decision to ask for a punitive discharge was the appellant's. Government Response to Court Order of 20 Jul 2009.

We are satisfied that defense counsel's decision to ask for a bad-conduct discharge was both tactical and done with the express consent of the appellant. We do not find that trial defense counsel's request for a bad-conduct discharge was in any way inconsistent with the appellant's express desires.

**Conclusion**

The findings and the approved sentence are affirmed.

Senior Judge BOOKER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court