

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

**Before  
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JIMMY D. REGALADOZAMBRANO  
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200900324  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 26 February 2009.

**Military Judge:** LtCol Peter Rubin, USMC.

**Convening Authority:** Commanding Officer, Combat Logistics  
Regiment 1, 1st Marine Logistics Group, MARFORPAC, Camp  
Pendleton, CA.

**Staff Judge Advocate's Recommendation:** LtCol T.J. Enge,  
USMC.

**For Appellant:** CAPT Martin Grover, JAGC, USN.

**For Appellee:** LtCol John Scott, USMCR; Maj Elizabeth  
Harvey, USMC.

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 90 days, forfeiture of \$933.00 pay per month for three months, reduction

to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, but, in accordance with the pretrial agreement, suspended all confinement in excess of 60 days for a period of twelve months from the date of his action.

The appellant initially submitted the case on its merits. Upon review of the record, we specified the following issue:

Whether trial defense counsel was ineffective when (1) she failed to submit clemency on the appellant's behalf absent a formal written waiver or indication in the record that the appellant intended to waive his right to submit clemency (*See, United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005)) and/or (2) she informed the convening authority that she would not submit clemency matters because the appellant failed to respond to her attempts to contact him?

Having reviewed the record of trial and the parties' briefs on the specified issue, 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.

#### **Ineffective Assistance of Counsel**

Before the CA acted on the results of trial, the appellant had a right to "submit to the [CA] any matters that may reasonably tend to affect the [CA]'s decision whether to disapprove any findings of guilt or to approve the sentence." RULE FOR COURTS-MARTIAL 1105(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The CA's action was the appellant's "best hope" for clemency. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

On 6 May 2009, Captain [O], USMC, the appellant's detailed trial defense counsel, informed the CA that, upon receipt of the record of trial on 16 April 2009, she attempted to telephone and mail a letter to the appellant in order to discuss his post-trial submission options. She directed the appellant to respond "within the next 10 days if he had any matters to submit." She further informed the CA that she received the staff judge advocate's recommendation on 27 April 2009, but as of 6 May 2009, she had not received any response for the appellant. Finally she stated that "[d]ue to my inability to reach [the

appellant] and his failure to respond to my request, I will not be submitting clemency on his behalf."

"[T]he right of a military accused to effective assistance of counsel after his trial is a fundamental right." *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)(citation omitted). In order to prevail on a claim of ineffective assistance of counsel, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. Additionally, "counsel's performance is judged upon the reasonableness of the counsel's perspective at the time of the alleged deficiency." *United States v. Lowe*, 50 M.J. 654, 656 (N.M.Ct.Crim.App. 1999)(citations omitted).

Assuming, without deciding, that Captain [O's] performance was deficient, we conclude that the appellant has not satisfied the second *Strickland* prong.<sup>1</sup> In his response to the court's specified issue, he did not indicate what additional matters he would have submitted to the CA, either in this brief or via an affidavit or any other written correspondence. Therefore, he has failed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the results would have been different." *Strickland*, 466 U.S. at 687.

### Conclusion

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

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>1</sup> While the Court has declined to brand Capt [O's] post-trial legal representation of the appellant as deficient, that restraint is exercised only due to the lack of any evidence of prejudice in the record before us.