

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JASON D. JONES
HOSPITALMAN (E-3), U.S. NAVY**

**NMCCA 201100592
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 5 August 2011.

Military Judge: CAPT John K. Waits, JAGC, USN.

Convening Authority: Commanding Officer, Naval Hospital,
Pensacola, FL.

Staff Judge Advocate's Recommendation: LCDR Cheryl R.
Ausband, JAGC, USN.

For Appellant: CDR Edward V. Hartman, JAGC, USN.

For Appellee: LT Joseph M. Moyer, JAGC, USN.

20 March 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of unlawfully possessing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises a single assignment of error, averring that his trial defense counsel were ineffective, specifically for failing to inform him of the full scope and of the collateral effects of his conviction under the specific nuances of Alabama law.¹

In order to prevail on a claim of ineffective assistance, the appellant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006) (citing *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

In support of the assigned error, we have before us the sworn declaration of the appellant and another from his father. Importantly, we also have the trial defense counsel's submission pursuant to RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), wherein he acknowledges outright his failings in not informing the appellant of the full effect of his conviction, specific to Alabama law. For this reason, additional affidavits would be to no effect. See generally *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

Considering the affidavits and the record as a whole, after *de novo* review, we find that the appellant has not met his burden in demonstrating deficiency by his counsel that would serve as a basis for relief. The record before us is exhaustively clear that the appellant was informed, in the context of his plea, of the sex offender registration

¹ WHETHER APPELLANT SUFFERED FROM CONSTITUTIONALLY DEFICIENT ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL MISREPRESENTED THE SEVERITY OF HIS CONVICTION AND FAILED TO COUNSEL HIM ON ALABAMA'S PROHIBITION OF LIVING WITH HIS CHILD IF BEING CONVICTED OF A QUALIFYING SEX OFFENSE?

requirement, consistent with *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). Sex offender status played a prominent and recurring role throughout the court-martial. It was first addressed by the military judge immediately upon the entering of the plea. Record at 15. It was addressed again, with additional specificity, during a discussion of the terms of a pretrial agreement the appellant entered into with the convening authority, where the appellant acknowledged that he was informed about sex offender registration and specifically advised by his trial defense counsel, "to consult with local counsel, that is, in Alabama, regarding specific details of your duties and obligations on returning to Alabama" *Id.* at 72; see also Appellate Exhibit I at ¶ 19. Sex offender registration, as a "life long" consequence of the appellant's plea, was argued by the trial defense counsel as a significant aspect of the sentencing calculus before the court. Record at 138-40. The appellant submitted an unsworn statement for consideration by the military judge in sentencing, containing the following sentence: "I realize that I may have to register as a sex offender." Defense Exhibit A. The appellant's post-trial affidavit similarly states, "My Detailed Defense Counsel informed me that the state of Alabama, along with federal law, may require that I register as a sex offender." On the state of this record, we cannot find a legal error rising to a deficiency in performance, because the advice provided was in consonance with *Miller* and the plea was entered with the appellant apprised of this significant collateral consequence. However, the appellant did not have an in depth understanding, specific to Alabama law, which begets additional analysis to ensure the providency of the plea. See generally *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008).

Assuming without deciding that the appellant has met his burden in demonstrating a deficiency in performance and establishing error, consistent with *United States v. Denedo*, 66 M.J. 114, 127 (C.A.A.F. 2008), we must next assess the appellant's declaration that he would not have pled guilty but for the erroneous (in this case, incomplete) advice. In the specific context of a guilty plea, the appellant must, "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.'" *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The appellant has not met his burden, and we cannot conclude that a rational defendant would have insisted on going to trial on the facts of this case. The evidence is compelling and straightforward, establishing knowing, wrongful

possession of child pornography by the appellant on his personal laptop, supported by admissions by the appellant to law enforcement personnel. A rational defendant would have sought to minimize his punitive exposure, availed himself of the misdemeanor-level jurisdiction of a special court-martial, and entered a contextually favorable pretrial agreement, as the appellant did in this case.

The record reveals that the appellant was properly advised per *Miller*. When he made more specific inquiries regarding his intended future state of residence, he was advised to consult local counsel. This point was captured in his pretrial agreement and twice discussed at his court-martial, where the appellant proceeded with his plea and expressed satisfaction with counsel and their advice. The error, as assigned, would require this court to extend the prophylaxis of *Miller*, holding that counsel who were effective at this special court-martial, were nonetheless ineffective for failing to inform the appellant of the specifics of state law matters, about which the appellant was specifically advised to consult local counsel. We decline to do so, as the appellant has not established a reasonable probability that he would have demanded a trial on the merits. See *Alves*, 53 M.J. at 289.

Based on the entire record, including the post-trial affidavits, we conclude that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. Accordingly, we affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court