# United States Navy-Marine Corps Court of Criminal Appeals

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**UNITED STATES**
Appellee

**v.**

**Eric C. LAKE**
Lance Corporal (E-3), U.S. Marine Corps
Appellant

**No. 201800151**

Appeal from the United States Navy-Marine Corps Trial Judiciary

Decided: 30 April 2019.

Military Judge:
Colonel Joseph P. Lisiecki, USMC.

Sentence adjudged 19 March 2018 by a special court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence approved by convening authority: reduction to E-1, confinement for eight months, and a bad conduct discharge.

For Appellant:
*Captain Bree A. Ermentrout, JAGC, USN.*

For Appellee:
*Major David N. Roberts, USMCR;*
*Lieutenant Kimberly Rios, JAGC, USN.*

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**This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.**

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Before HUTCHISON, TANG, and LAWRENCE,
*Appellate Military Judges.*

PER CURIAM:

At his court-martial, the appellant pleaded guilty in accordance with a pretrial agreement to a three-day period of unauthorized absence and one specification each of using, distributing, and possessing cocaine, in violation of Articles 86 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886 and 912a.

On appeal the appellant contends that he received ineffective assistance of counsel during the post-trial proceedings because his detailed defense counsel failed to acknowledge receipt for the record of trial or the Staff Judge Advocate's Recommendation (SJAR) and failed to submit any matters in clemency. We find no prejudicial error and affirm the findings and sentence.

## I. BACKGROUND

The appellant was represented by both detailed defense counsel and civilian counsel at his court-martial. After being advised of his post-trial and appellate rights, the appellant indicated that he wanted his copy of the record of trial and the SJAR to be forwarded to his "defense counsel" but did not indicate whether that meant his detailed defense counsel or his civilian defense counsel.[1] Regardless, the government sent copies of the record and SJAR to both counsel, and neither acknowledged receipt nor submitted any clemency matters on behalf of the appellant.

## II. DISCUSSION

The appellant contends that his counsels' failure to submit matters in clemency amounted to ineffective assistance of counsel. He argues that he suffered prejudice because he had dependents—a spouse and young daughter—who could have benefitted from the deferral and waiver of automatic forfeitures.

"By virtue of Article 27, UCMJ, 10 U.S.C. § 827, as well as the Sixth Amendment of the Constitution, a military accused is guaranteed the effective assistance of counsel." *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987). That right extends to post-trial proceedings. *United States v. Cornett*,

[1] Appellate Exhibit III at 3; *see also* Record at 102. The civilian defense counsel's notice of appearance, AE IV, stated, "The Accused intends to have his detailed uniformed military defense counsel be responsible for all post-trial matters."

47 M.J. 128, 133 (C.A.A.F. 1997). In reviewing claims of ineffective assistance of counsel, we "look[] at the questions of deficient performance and prejudice *de novo*." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). However, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007), *cert. denied*, 552 U.S. 952 (2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Thus, the appellant bears the burden of demonstrating (1) that his counsel's performance was deficient to the point that he "was not functioning as the counsel guaranteed the defendant by the Sixth Amendment" and (2) that the deficient performance prejudiced the defense. *Id.* (citation and internal quotation marks omitted). With regard to post-trial claims of ineffective assistance of counsel, courts must give an appellant the benefit of the doubt and find that "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)).

The mere failure to submit clemency matters, by itself, does not automatically establish deficient representation. *United States v. Cobe*, 41 M.J. 654, 655 (N-M. Ct. Crim. App. 1994) (citing *United States v. Robertson*, 39 M.J. 211, 218 (C.M.A. 1994)). Such failure must be assessed on a case-by-case basis. *Id.* We will not seriously entertain claims of inadequate representation based on the failure to exercise post-trial rights without "submission of an affidavit by the appellant stating how counsel's inaction contrasted with his wishes." *United States v. Starling*, 58 M.J. 620, 623 (N-M. Ct. Crim. App. 2003). Likewise, when a claim of ineffective assistance of counsel arises from the failure to submit matters in clemency, the appellant must detail the "content of the matters that would have been submitted." *Id.*

We do not condone counsels' failure to acknowledge receipt of the record of trial or the SJAR. But here, the appellant has submitted no affidavit explaining how his counsels' failure to submit matters in clemency contrasted with his wishes or detailing the specific matters he would have submitted to the convening authority. "We will not presume that the trial defense counsel's failure to exercise specific . . . post-trial rights was contrary to the appellant's wishes." *Id.* Further, even assuming *arguendo* that the counsels' failure to submit clemency matters did constitute deficient representation, we still find no prejudice. The appellant received the benefit of his pretrial agreement by having his charges referred to a special vice general court-martial, and his counsel presented a robust presentencing case replete with mitigation evidence. This mitigation evidence included letters from family and friends and a lengthy unsworn statement from the appellant in which he spoke about his wife and daughter and desire to be a good husband and father and to be able

to provide for his family. All of the appellant's evidence in mitigation was contained within the record of trial, which the convening authority specifically considered in taking his action on the appellant's sentence. The appellant has offered no showing of what additional evidence, if any, he would have submitted to the convening authority. The appellant bears the burden of establishing prejudice, and he has put forth nothing to meet that burden in this case.

## III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights occurred. Arts. 59 and 66, UCMJ.

However, we note that the court-martial order (CMO) does not accurately reflect the court-martial findings for Charge II, Specification 3. Although the CMO accurately states that the appellant pleaded guilty to the specification, except for the words "with the intent to distribute the said controlled substance," the CMO inaccurately reflects that the court-martial found the appellant guilty as charged in the specification.[2] Before the military judge announced the findings, the trial counsel moved to withdraw the language to which the appellant entered a plea of not guilty, and the military judge granted this request. The military judge then found the appellant guilty of the specification as excepted. Although we find no prejudice from this error, the appellant is entitled to have court-martial records that correctly reflect the content of his proceeding. *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998). Accordingly, the supplemental CMO shall reflect that the appellant was found guilty of Charge II, Specification 3, except for the words, "with the intent to distribute the said controlled substance."

Accordingly, the findings and sentence as approved by the convening authority and as corrected above are **AFFIRMED**.

[2] CMO of 9 May 2018.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court