UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRANDON T. ROSE
United States Air Force

ACM 36508 (f rev)

11 June 2010

Sentence adjudged 11 October 2005 by GCM convened at Scott Air Force Base, Illinois. Military Judge: David F. Brash (sitting alone) and Jennifer Whittier (*DuBay* hearing).

Approved sentence: Dishonorable discharge and confinement for 20 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Michael A. Burnat, Major John S. Fredland, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, Major Jefferson E. McBride, and Gerald R. Bruce, Esquire.

en banc

BRAND, JACKSON, HELGET, THOMPSON and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

This opinion is subject to editorial correction before final publication.

GREGORY, Judge:

Following our 12 February 2009 decision setting aside the findings of guilty of indecent assault based on ineffective assistance of counsel,[1] our superior court found

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[1] *United States v. Rose*, 67 M.J. 630 (A.F. Ct. Crim. App. 2009).

error in our denial of a government motion to order the appellant's first trial defense counsel, Mr. (formerly Captain) BG, to submit an affidavit.[2] Our superior court directed that we reconsider the issue of ineffective assistance of counsel after receipt of the affidavit. We also permitted the appellant and appellee to again brief the issue of ineffective assistance of counsel.

The much litigated, much anticipated affidavit of the appellant's original trial defense counsel arrived in December 2009—and it adds nothing. Mr. BG represented the appellant during the early investigatory stage and at the first Article 32, UCMJ, 10 U.S.C. § 832, hearing. On the now critical issue of advice concerning sex offender registration, Mr. BG states, "With regard to any discussions regarding sex offender registration, I have no recollection, one way or the other, as to whether [Airman Basic (AB)] Rose and I discussed this matter prior to AB Rose releasing me as his [area defense counsel]."

Thus, with no new facts we nevertheless reconsider our prior decision finding ineffective assistance of counsel. Although we previously denied a request to reconsider our prior decision en banc, we now do so on our own initiative based on changes in the composition of the original panel.[3]

Although the composition of the Court has changed, the facts of this case have not. The issue remains the same. The appellant asserts that he received ineffective assistance of counsel when his trial defense team, and specifically his civilian defense counsel, erroneously advised him that conviction of the indecent assault offenses would not require him to register as a sex offender. He argues that had he known he would have to register as a sex offender, he would not have pled guilty to those offenses. The relevant facts were developed at a post-trial hearing ordered by the Court pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), and were referenced in our prior decision.

"A determination regarding the effectiveness of counsel is a mixed question of law and fact. We review findings of fact under a clearly erroneous standard, but the question of ineffective assistance of counsel flowing from those facts is a question of law we review de novo." *United States v. Baker*, 65 M.J. 691, 696 (Army Ct. Crim. App. 2007) (internal citations omitted). In assessing such claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984), *quoted in United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). To prevail, the appellant bears the burden of showing both: (1) that his counsel's performance fell measurably below an objective standard of reasonableness and (2) that any perceived deficiency operated to the prejudice of the

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[2] The Judge Advocate General certified this issue along with the substantive issue of ineffective assistance of counsel.
[3] Senior Judge Francis, the author of the prior decision, has retired along with Senior Judge Heimann, his colleague in the majority. Only Judge Thompson, who dissented regarding ineffective assistance of counsel, remains.

appellant. *Strickland*, 466 U.S. at 688, 692; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). With regard to the first prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. With regard to the second prong, an appellant in a guilty plea case "must also 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." *Tippit*, 65 M.J. at 76 (citations and quotations omitted).

Applying the above test to a claimed failure to advise on the potential collateral consequences of a criminal conviction, our superior court held that counsel's complete failure to advise a military accused that he might be subject to sex offender registration requirements if convicted does not constitute deficient performance under the first prong of *Strickland* and so "does not rise to the level of ineffective assistance of counsel." *United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006). *Miller* did, however, establish a prospective rule requiring trial defense counsel to affirmatively advise clients on the potential for sex offender registration.[4] *Id*. at 459. This prospective rule anticipates the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court imposed a duty on counsel to advise criminal defendants concerning the significant collateral consequence of deportation. In holding that misleading advice concerning the risk of deportation may constitute ineffective assistance of counsel, the Court noted that where the consequence is uncertain counsel need only advise the client of the risk, but when the consequence is clear the advice must also be clear. *Padilla*, 130 S. Ct. at 1483. In no case, however, should counsel provide false assurances concerning the collateral consequence. *Id*. at 1484-85.

Numerous federal courts have held that affirmative misrepresentations by counsel about significant collateral consequences of a conviction may constitute ineffective assistance of counsel. *See United States v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005); *United States v. Cuoto*, 311 F.3d 179, 187-88, 191 (2d Cir. 2002). *Padilla* rejected language in those decisions that would limit ineffective assistance concerning collateral consequences to those cases involving affirmative misadvice on the basis that adopting such a rule would encourage counsel to simply remain silent: "Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla*, 130 S. Ct. at 1484 (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)). In the present case, we have more than just silence in the face of repeated questions by the client concerning the admittedly important collateral consequence of sex offender registration; counsel provided the false assurance that the consequence would not happen.

[4] Failure to so advise an accused on such matters after *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006), while not per se ineffective assistance, is one factor courts will consider in measuring counsel's performance. The appellant's court-martial occurred prior to the *Miller* decision.

We evaluate the context and manner of the civilian defense counsel's advice based on evidence produced at the *DuBay* hearing and conclude that the advice affirmatively misrepresented the requirement for the appellant to register as a sex offender if he pled guilty to indecent assault. The statements of the appellant's civilian defense counsel clearly attempt to minimize the seriousness of the indecent assault charges and assure the appellant that he would not have to register as a sex offender. In his testimony at the *DuBay* hearing, Mr. NC, the appellant's civilian defense counsel, repeatedly used such phrases as "fairly innocuous" and "just foolery" to describe the sexual assault offenses. Mr. NC claimed lack of memory on many points but, in response to questions from the military judge, did recall concluding that sex offender registration was "not really a credible concern." Consistent with this testimony, the appellant testified that when he directly asked Mr. NC if sex offender registration would be required Mr. NC told him: "I don't see why it would be with the allegations that were brought against you. I don't see why that would be a registerable offense." The military judge at the *DuBay* hearing found the appellant's testimony regarding his interactions with civilian defense counsel credible.

The advice by the appellant's civilian defense counsel is analogous to that in *Kwan*, wherein the court found ineffective assistance of counsel based on faulty advice concerning deportation. In *Kwan*, the court found that counsel affirmatively misled his client when he "assured Kwan that although there was technically a possibility of deportation, '*it was not a serious possibility*.'" *Kwan*, 407 F.3d at 1008 (emphasis added). To distinguish *Kwan*, government counsel attempts to characterize the civilian defense counsel's advice in the present case as nothing more than a statement that "he does not know." If the civilian defense counsel had only expressed ignorance or given no advice at all this case would be analogous to a complete failure to advise like that in *Miller*. However, like the counsel in *Kwan*, Mr. NC went much further than that: he rendered an opinion by advising the appellant that he saw no reason why he would have to register. This is an affirmative misrepresentation, and nothing in Mr. BG's affidavit changes that conclusion.

The second specified issue before our superior court alleges error by our equating an "impression" with an affirmative misrepresentation. The brief by government counsel emphasizes this distinction in arguing that the civilian defense counsel "never . . . directly" said that the appellant would not have to register. The dissent takes a similar tack. However, we do not base our decision on the appellant's impression but focus instead squarely on the civilian defense counsel's advice. Claims of ineffective assistance of counsel turn not on the client's impression of legal advice but on the advice itself.

Contrary to the dissent's assertion that we base our decision on statements "taken out of context," we have objectively considered the totality of the attorney's advice in this case, including the manner in which it was delivered, and conclude that it was

reasonably calculated to lead the appellant to believe that he would not have to register as a sex offender. Like the court in *Kwan*, we cite to language that accurately characterizes the advice rendered: Mr. NC told the appellant sex offender registration was "not really a credible concern" and, based on the allegations brought against the appellant, he did not "see why that would be a registerable offense." We reaffirm the view of civilian defense counsel's advice stated by Senior Judge Francis in our prior decision: "Uneducated in the ways of 'lawyer speak,' the appellant was not required to further ferret out and eliminate potential inconsistencies in his counsel's response, but was entitled to rely on the totality of the advice given to him by the professional lawyer representing him and whom he understandably expected to know the law." *United States v. Rose*, 67 M.J. 630, 634-35 (A.F. Ct. Crim. App. 2009). A recent television commercial offers a similar perspective on such lawyer speak in layman's terms: "Even kids know it's wrong to hide behind fine print." Nor should this lawyer's misleading advice be allowed to hide behind the fine print of equivocation when the totality of the advice clearly conveyed that the appellant would not have to register as a sex offender if he pled guilty.

As held in *Kwan*, affirmative misrepresentations by counsel concerning significant collateral consequences of a conviction may constitute ineffective assistance of counsel. *Miller's* prospective requirement for advice concerning sex offender registration implicitly recognizes the significance of this collateral consequence. We find that the affirmative misrepresentations by the civilian defense counsel on this significant collateral consequence is ineffective assistance of counsel. Even cursory research would have disclosed that conviction of the indecent assaults carried a substantial risk that the appellant would have to register as a sex offender. In the face of this obvious and substantial risk, the appellant's civilian defense counsel could see "no reason" why he would have to register. Erroneous advice in this important area falls measurably below the level of performance reasonably expected of professional legal counsel.

Nothing in the affidavit of Mr. BG weakens the conclusion that counsel's erroneous advice prejudiced the appellant. The *DuBay* testimony of the civilian defense counsel shows the importance of this issue to the appellant's decision to plead guilty: Mr. NC acknowledged that if he had known that the appellant would have to register as a sex offender, he "would have had a hard time advising [the appellant] to plead guilty." The appellant's testimony tracks with his counsel's apparent regret, telling the military judge that he felt "betrayed and tricked into signing a [pretrial agreement]" and that he did not again contact his civilian defense counsel because he "wasn't going to ask for advice from someone who just did that to me." Finally, the trial defense counsel confirms the substantial importance of sex offender registration to the appellant's decision to plead: "One thing [the appellant] made clear to me, and this is the one thing from the case that sticks out is he wasn't going to plead to the indecent assaults if he had to register as a sex offender."

The government counsel argues against a finding of prejudice on the basis that sex offender registration was for the appellant only a "key concern" rather than a "controlling concern." Such semantics do not undermine our finding of prejudice. For prejudice to result from faulty advice regarding a collateral consequence of a guilty plea, the law requires that the issue be "a significant factor in deciding how to plead." *United States v. Denedo*, 66 M.J. 114, 129 (C.A.A.F. 2008). Other factors could be important as well, such as confinement was in this case, but an accused is not limited to just one major concern as he or she faces the military justice system. Here, the evidence clearly shows that sex offender registration was a significant concern of the appellant in his decision to plead guilty. Plea negotiations are a critical phase of criminal litigation during which the appellant was entitled to effective assistance of counsel. *Padilla*, 130 S. Ct. at 1486. His counsel's erroneous advice on this significant concern deprived him of that assistance.

Having reconsidered the issue of ineffective assistance of counsel after receipt of Mr. BG's affidavit as directed by our superior court, we again find that the appellant has met his burden of proof under both prongs of the *Strickland* test and set aside the findings of guilty as to Specifications 1, 2, and 3 of Charge V. Concerning the balance of the charges, we previously affirmed the findings of guilty as to the remaining charges and specifications but set aside the sentence and authorized a rehearing with respect to Specifications 1, 2, and 3 of Charge V and the sentence; however, the other issues that may impact that disposition remain with our superior court.[5]

JACKSON, Senior Judge (Dissenting in Part, Concurring in Part)

I respectfully dissent from the majority's finding of deficient conduct but agree with the majority that *if* the appellant's trial defense counsel's conduct was deficient such conduct prejudiced the appellant. In the simplest terms, is this a case of misinformation/misstatement or is this a case of a failure to advise? If it is the former, then such *could* amount to deficient conduct whereas if it is the latter then such would not amount to deficient conduct unless counsel had an obligation to advise on the collateral consequences of pleading guilty. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (holding that when the law is not succinct and straightforward, a criminal defense attorney need do no more than advise the accused that pending criminal charges may carry a risk of adverse immigration consequences); *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006) (holding that it is not necessary for trial defense counsel to become knowledgeable about, and thus advise the accused on, the sex offender registration

[5] Before a general court-martial composed of military judge alone, the appellant pled guilty pursuant to a pretrial agreement of one specification of attempted larceny, violation of a lawful order, drunk driving, forgery, house breaking, and obstructing justice, in violation of Articles 80, 92, 111, 123, 130, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 911, 923, 930, 934; 11 specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; and three specifications of indecent assault, in violation of Article 134, UCMJ. The adjudged and approved sentence consists of a dishonorable discharge and confinement for 20 months. Having set aside the findings of guilty as to Specifications 1, 2, and 3 of Charge V, we would reassess the sentence and find it nonetheless appropriate.

statutes of every state, but establishing a prospective rule, effective 90 days after the decision, requiring trial defense counsel to inform any accused charged with an offense listed in the Department of Defense Instruction 1325.7, Enclosure 27, that the accused will have to file as a sex offender);[6] *McAdoo v. Elo*, 365 F.3d 487, 499 (6th Cir. 2004).

The majority finds misinformation/misstatement, and thus deficient conduct, despite the fact that the record makes it clear that the appellant's trial defense counsel never gave the appellant a definitive answer on the sex offender registration requirement. On this point, I note the following relevant appellant testimony from the *DuBay*[7] hearing:

> [DC:][8] Do you remember who you asked specifically?
>
> [APP:] I believed I asked Captain [(Capt) TL] first, and he referred me to my leading counsel saying he did not know.
>
> [DC:] Okay, and did you ask Mr. [NC] specifically?
>
> [APP:] Yes. I asked Mr. [NC], and he then said he was not sure, but he did not think I had to due to the fact of he would see no reason with the allegations that were made that someone would have to register for that.
>
> . . . .
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> [TC:] You testified and you agree that neither [Capt TL], then [Capt TL] nor [Technical Sergeant (TSgt) DD] told you that you would not have to register as a sex offender if you pled. Essentially, they referred you to [Mr. NC]?
>
> [APP:] Oh, yes, sir.
>
> [TC:] They never gave you any direct advice as to whether you'd have to register?
>
> [APP:] No, no direct advice, neither to or not to.
>
> [TC:] So they never represented to you that didn't have to [sic], would not have to register.

[6] The prospective rule is inapplicable in the appellant's case because he was tried prior to the decision in *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006).

[7] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[8] There are four abbreviations that will be used during the recitation of portions of the testimony from the *DuBay* hearing. DC indicates the defense counsel; APP indicates the appellant; TC indicates the trial counsel; and MJ indicates the military judge.

[APP:] Right.

[TC:] Okay. You would agree that neither [Capt TL] nor [TSgt DD] were present during your conversations with [Mr. NC] on the subject of registration?

[APP:] I believe [Capt TL] was present one time, but he didn't have anything to say about it. I believe that, when all three were in the office one time when I brought it up, and it was deferred. They didn't know, but Mr. [NC] would check into it.

[TC:] So it was just left open-ended. He was like saying, "I don't know."

[APP:] Yes, sir.

[TC:] Mr. [NC] said, "I'll look into it further."

[APP:] Yes, sir.

[TC:] Okay. So you testified that, when you talked to Mr. [NC], you said, I believe the word you testified to was you were given the impression that you would not have to register as a sex offender.

[APP:] Yes, sir.

[TC:] So he never came out directly and said you would not have to.

[APP:] No. He just said, "I see no reason why you'd have to with these charges."

[TC:] At one point, you testified that Mr. [NC] actually said that he wasn't sure.

[APP:] Right. I was told so many different things that it kind of comes up being—in the end, I put it in my attorney's hands, and I said, "Hey, what's the best advice you can give me, you know, what to do?" He was like, "I don't see no reason why you'd have to register. My best advice is go ahead and sign the [pretrial agreement]."

[TC:] So the issue was a little confusing?

[APP:] Real confusing.

[TC:] Okay. So it is possible you didn't necessarily completely understand what he was telling you?

[APP:] The only thing I understood was that, from his—the way he looked at it, I would not have to. That's what I understood. There was no way I could see it where it was telling me I'd have to.

[TC:] Okay, but he never said that directly. He said he's not sure. He'd check into it?

[APP:] Yes, sir.

. . . .

[MJ:] Explain to me again then how that worked. How did you bring it up, and who did you bring it up to?

[APP:] I believe I first brought it up to [Capt TL], and he referred to me stating he wasn't real sure and referred me to my leading counsel.

[MJ:] So you first asked [Capt TL]?

[APP:] Yes, ma'am.

[MJ:] He said he wasn't sure.

[APP:] Yes, ma'am.

[MJ:] He told you to go to your leading counsel?

[APP:]: Yes, ma'am.

[MJ:] Who was Mr. [NC]?

[APP:] Yes, ma'am.

[MJ:] So what did you do after that?

[APP:] After I went to Mr. [NC] and asked him, I believe we were all in the same room for a meeting. I believe [Capt TL] was there, too, if I recall correctly. It's been so long ago. I asked if I'd have to register, and the way he put it, he said some terms and things, but the way he swept it under the rug, and he never—

. . . .

[MJ:] What did you ask Mr. [NC]?

[APP:]: I said, by pleading guilty to an indecent charge, is that a registering offense. He said—he put it, "I don't see why it would be with the allegations that were brought against you. I don't see why that would be a registerable offense."

[MJ:] Did he say anything else?

[APP:] No, ma'am.

[MJ:] Was that the only—did Mr. [NC] tell you that when [Capt TL] was present?

[APP:] Yes, ma'am.

[MJ:] Did Mr. [NC] give you any other advice about sex offender registration at any other time?

[APP:] No, ma'am, I do not believe so. If he did, it was the same answer as he would find out or he'd push it off.

[MJ:] Well, did he say he was going to find out, or did he say he didn't see why you'd have to register, and how many times do you think you discussed this with him?

[APP:] It was so long ago. I probably brought it up to him two or three times and got the same answer every time.

[MJ:] What answer did you get?

[APP:] I know I got a he would find out one time, and then I know I got a he saw no reason why. I just know for a fact he never told me I'd have to, and the way he made it seem was I wouldn't have to by everything that he was saying, and he never raised the question asking me. . . .

. . . .

[MJ:] He either told you that he saw no reason why or he'd find out and tell you.

[APP:] Yes, ma'am.

The relevant portions of Mr. NC's *DuBay* testimony are as follows:

> [MJ:] Okay. Well, how was the issue raised?
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> [Mr. NC:] . . . I remember that Airman Rose raised the issue while over in their guest counsel's office with myself and [Capt TL] present, and it was raised like a number of any other questions that a client might ask . . . . I do recall the issue being raised and, at the time, I can't recall that I had a good answer for it.
>
> [MJ:] Okay. So he asked you about it. Did you ever give him a definitive answer?
>
> [Mr. NC:] I did not.
>
> [MJ:] Okay. Why was he not given a definitive answer?
>
> [Mr. NC:] Well, I think that it was a matter of not completely exhausting all the reasonable and understandable questions that a client might ask and probably just a matter of not addressing exhaustively everything that might possibly have come up in those circumstances. . . . There was also some contextual circumstances, again, by way of explanation rather than excuse, concerning the sexual offense charges that we eventually pled to that, I would say, for lack of a better term, kind of eclipsed the issue as it was raised at that time.
>
> [MJ:] Okay. Did you ever tell him that he would not have to register as a sex offender?
>
> [Mr. NC:] No.
>
> . . . .
>
> [DC:] Based on those mitigating circumstances, did that raise doubt to you as to whether or not he'd have to register as a sex offender?
>
> [Mr. NC:] It didn't raise any doubt because I didn't identify the issue as one that we were seeking an answer to. As I said, I recall it being—going up like a flare and, whatever became of it, you know, the rest is history. I don't have a good recollection. At least I know that it was not dispositively responded to.

[DC:] Do you ever remember telling Airman Rose that, you know, based on the facts of the assault charges, that you don't think he would possibly have to register, but that you get back to him later on? Do you remember any conversation like that?

[Mr. NC:] I can tell you that I don't have a strong recollection, so I can't testify honestly that—and I've definitely searched. You know, I've done some, not only soul-searching but file re-reading as well as just, you know, brain searching to see if there was anything that led me to believe that we had any type of material discussion or substantive discussion on it, and my best recollection was that, like I said, the issue got raised along with a number of, you know, questions that were raised on the eve of proceedings and in the process of negotiation, but it never got thoroughly vetted.

. . . .

[MJ:] To the best of your recollection, how was the issue raised?

[Mr. NC:] I think our client raised it in the form of, "I won't have to register as a sex offender, will I," or words to that effect.

[MJ:] So he asked about it. He specifically asked.

[Mr. NC:] That's my recollection, yes. I believe that's correct.

[MJ:] What do you recall saying to him?

[Mr. NC:] I remember saying, "That's a good question." I really don't remember what I said other than the fact that I wouldn't have known the answer to that. . . . I can sit here and say that we honestly just didn't thoroughly vet it out.

[MJ:] So do you just not recall what you said to him in response?

[Mr. NC:] I really don't. I think that, because I do remember him just raising that issue, that I looked at my co-counsel, and he looked at me, and I thought, "We'll try to get answer to that." I remembered my—

[MJ:] I guess the question I'm trying to figure out is can you recall how you responded to Airman Rose when he raised the question?

[Mr. NC:] I don't believe I gave him any advice on it at the time.

[MJ:] So you don't recall what you said?

[Mr. NC:] I do not then. I'd be guessing.

. . . .

[MJ:] So you didn't do anything in furtherance of getting an answer the question.

[Mr. NC:] I did not.

. . . .

[MJ:] Do you have any recollection or do you believe that you ever told him he would not have to register? Do you ever recall telling him that?

[Mr. NC:] No. No.

[MJ:] Do you ever recall opining that he might not have to register?

[Mr. NC:] You know, I've looked through my notes as counsel at the time and didn't see any mention of it, so I don't—my conclusion is that I wouldn't have given him an opinion on something that I just didn't know the answer to at the time.

The relevant portions of Capt TL's *DuBay* testimony are as follows:

[TC:] Okay. Did you ever discuss with Airman Rose the issue of whether he would have to register as a sex offender?

[Capt TL:] Yes.

[TC:] Could you tell us about these discussions?

[Capt TL:] Really, the heart of the discussions were Airman Rose would contact me about something, and when he would ask about a potential sex offender registration, I would advise him, you know, to talk to [Mr. NC] first. I told him, I don't know how many occasions, once or twice, I just can't recall that, back then I couldn't say for sure whether or not he had to register and whether it was going to be Alabama, Florida, or Illinois.

. . . .

[TC:] Okay. Did you ever tell him he would not have to register?

[Capt TL:] Not to my knowledge.

[TC:] So each time he came to you with this question, you referred him to [Mr. NC]?

[Capt TL:] Generally, yes, if I can recall correctly.

[TC:] Were you ever present during any converstations he had with [Mr. NC] on that issue?

[Capt TL:] Not that I remember.

. . . .

[MJ:] [Capt TL], do you ever recall a meeting with Airman Rose, Mr. [NC], and yourself here at Scott in the ADC office and Airman Rose asking about sex offender registration?

[Capt TL:] I don't recall that conversation. Whether one occurred, that doesn't mean it didn't occur. I mean it's almost two and a half years ago. . . . that likely could have come up, but I don't recall the conversation specifically.

[MJ:] Let me know if I understood your testimony correctly that what you recall related to sex offender registration was that Airman Rose asked you several times if he would have to?

[Capt TL:] Yes, ma'am.

[MJ:] Was that a telephonic conversation? Were those in telephonic conversations?

[Capt TL:] Telephonic a couple of times, and I think when he and I were going through the Care[9] inquiry together, I don't believe Mr. [NC] was there for that, he had asked me about it again and if I recall, I just referred him, you know, to [Mr. NC] if he wants a definitive answer.

[MJ:] Was Mr. [NC] there when you were reviewing the Care inquiry and the question was asked?

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[9] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[Capt TL:] Not that I recall at this part of the Care inquiry, and we went over it multiple times, but for this one, I don't recall him being there.

[MJ:] What do you—to the best of your recollection, how did those conversations—what was the substance of those conversations?

[Capt TL:] Airman Rose saying, you know, "I won't plead guilty if I have to register as a sex offender." Me telling him I can't give him a definitive answer whether he will or will not, you know . . . and referring him to [Mr. NC] to see if he could get a definitive answer from [Mr. NC] at least on Illinois, but he was also concerned, if I recall, about Alabama where he's from and Florida where he—at least his mom lived, he might return to.

[MJ:] Was this—did this seem like a big issue or a big concern for Airman Rose?

[Capt TL:] It seemed like the key issue.

[MJ:] Did you ever say anything to Airman Rose to lead him to believe that he might not have to, or did you just refer him to Mr. [NC]?

[Capt TL:] If I could recall, I just referred him to Mr. [NC], but I may have. It was two and a half years ago. I may have.

[MJ:] Pardon?

[Capt TL:] I don't believe I did, but I can't recall everything I told him. It wouldn't sound like the advice that we were taught to give, what I gave in these types of cases throughout my little over two years.

. . . .

[MJ:] Do you have any knowledge of Mr. [NC] giving advice one way or the other to Airman Rose in regards to registration?

[Capt TL:] No. I know that one large preparation meeting that they had, if I recall correctly, was the week before trial at his office that I wasn't present for, but I was aware that that had occurred.

[MJ:] So would it be fair to say that your only knowledge of discussions of sex offender registration is Airman Rose asking you a couple of times telephonically, once in person, you saying, "I don't have an answer. You need to talk to Mr. [NC]." Is that fair to say?

[Capt TL:] That's fair, ma'am, yes.

The sum of this exhaustive look at the relevant portions of the *Dubay* testimony on this issue is that the record makes it clear that Mr. NC and Capt TL never advised the appellant, one way or the other, on whether he would be required to register as a sex offender. Moreover, even if the appellant's *Dubay* testimony that Mr. NC advised the appellant he did not see why the appellant would need to register as a sex offender is to be believed, at most it would have been, as the appellant phrased, reflective of Mr. NC "pushing it off" and not providing a definitive answer one way or the other. Considering the entire record on this issue, and not merely snippets of the appellant's *DuBay* testimony taken out of context, it can hardly be said the appellant's counsel provided the appellant advice, much less erroneous advice, about his sex offender registration requirement.

Additionally, the majority discounts the findings of the military judge on this issue. The military judge found that the appellant's trial defense counsel did not answer the appellant's questions on this issue and never told him that he would not have to register as a sex offender. Her findings of fact are not clearly erroneous and are entitled deference absent a finding by this Court to the contrary. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). At most, the appellant had an impression that he would not have to register as a sex offender but this does not mean that his counsel provided him erroneous advice. Put simply, this is a case of failure to advise rather than a case of misinformation/misstatement. On this latter point, the trial defense counsel's failure to advise does not amount to deficient conduct because, as the *Miller* court recognized, given the plethora of state sex offender registration laws, trial defense counsel are not expected to become knowledgeable of, and thus advise their clients on, state sex offender registration laws and the requirements to register that derive therefrom. In short, for the aforementioned reasons, I dissent.

However, assuming, arguendo, that the appellant's counsel provided the appellant with erroneous advice on his sex offender registration requirements and thus assuming they were deficient in their conduct, I would join the majority and find prejudice. It is clear from the record, as Capt TL testified, that sex offender registration was a key concern of the appellant. Moreover, the appellant's claim on appeal that he would not have pled guilty if he had known that he would have to register as a sex offender is supported by the fact that on several occasions the appellant queried his counsel and the defense paralegals on the sex offender registration requirements and Capt TL's testimony that the appellant told him he would not plead guilty if he had to register as a sex offender. Accordingly, *if* his trial defense counsel's conduct was deficient, I would find prejudice.

THOMPSON, Judge (Dissenting)

I join my colleague in dissenting from the majority's findings of deficient conduct. However, with respect to prejudice, I respectfully dissent.

Ineffective Assistance of Counsel

Prejudice

I conclude the appellant has failed to establish the prejudice prong of the *Strickland*[10] test. The Supreme Court has held the prejudice requirement of *Strickland* "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The appellant has not met this burden.

It is clear from the appellant's own testimony at the *DuBay*[11] hearing that Mr. NC prefaced each response to the appellant's questions by saying he did not know or was not sure of the answer, and indicated that he would have to research the matter further to determine the answer. The appellant testified at the *DuBay* hearing that he "probably brought it up to him two or three times." Based on that response, the appellant clearly knew that he did not have a definitive answer to his question, yet nonetheless elected to proceed with the pretrial agreement (PTA), relying only on his "impression" that he would not have to register as a sex offender if convicted. I also find it instructive that the appellant, prior to raising the question with Mr. NC and Captain (Capt) TL,[12] had "heard rumors" that he might indeed have to register as a sex offender, so was already aware that it might be a possibility.[13] Although the appellant indicated that such rumors "were put to an end by my counsel," the totality of his *DuBay* testimony, and specifically his acknowledgement that Mr. NC told him he did not know the answer, belies that statement. The *DuBay* hearing military judge found the appellant was never told that he would not have to register.

The mere fact that the appellant, knowing that he did not have a definitive answer, nonetheless was still willing to enter into a favorable PTA and plead guilty to the indecent assaults strongly contradicts his *DuBay* testimony that he would not have pled guilty to those offenses if he had known he was required to register. Simply put, his actions speak louder than his appellate protestations to the contrary. From his willingness

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[10] *Strickland v. Washington*, 466 U.S. 668 (1984).
[11] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).
[12] Captain TL has since separated from the Air Force and was in civilian practice at the time of his *DuBay* hearing testimony.
[13] The appellant did not specify the source of such rumors.

to plead guilty without a definitive answer, I conclude that while sex offender registration was, as the *DuBay* judge found, a "key concern," it was not the controlling concern. Rather, as Mr. NC testified, the length of potential confinement "was an overriding concern" and the decision to plead guilty to the indecent assault offenses "was finally settled on the importance of the term of confinement, a limitation of confinement . . . ."[14] The appellant faced significant potential confinement of 41 years and 6 months for the offenses he was charged with as compared to the 24-month confinement cap pursuant to the PTA.[15] The *Dubay* hearing testimony contained references to PTA negotiations immediately prior to trial surrounding the three indecent assault charges. Mr. NC testified this was heavily negotiated. Without the three indecent assault charges being included in the PTA, the record indicates the government would not approve the PTA. In fact, the appellant testified at the *DuBay* hearing that Mr. NC told him to "plead out so we have a safety net of twenty-four months, and then we try to beat the twenty-four months with the different extracurricular activities and the sentencing phase . . . ." The record is clear. Limiting the confinement length was the controlling concern surrounding the decision to plead guilty to all the charges and specifications, including the three indecent assault specifications.

Review of the entire record reveals additional support for concluding that the appellant failed to establish that he was prejudiced. During the trial, the military judge inquired into the terms of the PTA and the appellant's plea. The relevant excerpts are as follows:

> MJ: Have you had enough time to discuss this agreement with your defense counsel?
>
> ACC: Yes, sir.
>
> MJ: Are you satisfied with their advice concerning the agreement is in your best interest?
>
> ACC: Yes, Your Honor.
>
> MJ: Did you enter into the agreement of your own free will?
>
> ACC: Yes, sir.
>
> MJ: Has anyone tried to force you to enter into the agreement?

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[14] Having so found, I need not determine whether or not the appellant was in fact required to register as a sex offender.
[15] Both the trial and defense counsel calculated the maximum punishment to include 37 years of confinement; this minor miscalculation did not prejudice the appellant.

ACC: No, sir.

MJ: Do you have any questions about the agreement?

ACC: No, sir.

MJ: Do you fully understand all the terms of the agreement and how they affect your case?

ACC: Yes, sir.

. . . .

MJ: Thank you. Airman Rose, have you had enough time and opportunity to discuss this case with both your defense counsel?

ACC: Yes, sir.

MJ: Have you, in fact, consulted fully with your defense counsel and received the full benefit of their advice?

ACC: Yes, sir.

MJ: Are you satisfied that their advice is in your best interest?

ACC: Yes, sir.

MJ: Are you satisfied with your defense counsel?

ACC: Yes, sir.

. . . .

MJ: All right. Airman Rose, I don't believe anything this morning or this afternoon has taken you by surprise. Nevertheless, if you would like, we've had extended delays and recesses. I'll be happy to give you any more time you need to discuss any outstanding issues or questions you have with your lawyers, or we can press on. That's your call. Do you want to take a minute, or do you want to press on?

ACC: We can press on, sir.

The appellant had the opportunity to clear up this important issue with the military judge or with his counsel, but did not do so. The appellant knew he did not have an answer, yet he also knew he was gaining the benefit of a limit on confinement length. If the issue of sex offender registration was as important to the plea as the appellant is now asserting, he would have taken this opportunity to clarify the issue.

Furthermore, review of the appellant's actions following sentencing and during clemency provide additional support that the appellant has not shown he was prejudiced. As background, the appellant testified in the *DuBay* hearing that upon entry into confinement he found out he would have to register as a sex offender. He testified he was "real upset" and "real mad" at his counsel. The *DuBay* hearing judge asked him, "So you at no point wanted to talk to either of them about the advice they gave you when you found out you were going to have to register?" The appellant answered: "No, ma'am, I didn't want to talk to either one of them about it." The appellant testified that he did call his mother and "got in touch with some of her friends that are attorneys that started trying to find out information." The appellant was sentenced on 11 October 2005, and submitted clemency matters on 3 November 2005. The clemency submission included a memo from the military trial defense counsel, a two-page memo from the appellant, and four letters from family members. There is not one reference in the clemency submission to the sex offender registration issue. The letters from family request the confinement be shortened and the discharge be changed. Even the letter from his mother has no mention of the sex offender registration issue. The defense counsel asks that confinement be shortened to 15 months. Finally, the appellant's own clemency memo requests the confinement be shortened to 15 months and contains nearly two pages of justification for granting clemency, but makes no mention of the sex offender registration issue. It is reasonable to conclude that had this issue been *the* reason the appellant pled guilty to the three indecent assault specifications, the issue would have been raised during clemency.

Based on the above, the appellant has failed to meet his burden as to both prongs of *Strickland* and his ineffective assistance of counsel claim is therefore without merit.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court