IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION FOR RECONSIDERATION**
	)	Before Special Panel
v.	)	
	)	ACM 40247
Staff Sergeant (E-5)	)	
DOUGLAS G. LARA,	)	7 May 2023
United States Air Force, *Appellant*.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rules 23.3(k) and 31 of this Honorable Court's Rules of Practice and Procedure (Rules), the United States respectfully moves this Court to reconsider its 10 April 2023 ruling in the above-captioned case. Specifically, the United States moves this Court to reconsider its ruling that Appellant's guilty plea "was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." United States v. Lara, No. ACM 40247, 2023 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. 10 April 2023). The Court misapplied a material legal matter, namely its analysis and application of Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. §20901. This Court seems to be under the misapprehension that there is an independent federal sex offender registration system and an independent "federal sex offender list" and that Appellant has been required to "register with federal authorities." *See* Lara, at *16 n.6, 18. (unpub. op.). But, as detailed below, SORNA does not create an independent federal sex offender registration system and does not create an independent federal sex offender list. And Appellant has not been required to "register with federal authorities," because such a process does not exist. Additionally, the Court overlooked or misapplied several material facts contained in the record regarding Appellant's sex offender

registration advisements and his motivation for both entering into a plea agreement and pleading guilty at his trial. For these reasons, this Court should reconsider its decision.

ISSUE FOR RECONSIDERATION

WHETHER THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT'S GUILTY PLEA WAS NOT A KNOWING, INTELLIGENT ACT DONE WITH SUFFICIENT AWARENESS OF THE RELEVANT CIRCUMSTANCES AND LIKELY CONSEQUENCES.

JURISDICTION

In accordance with Rules 15 and 31(b)-(c), this Court has the jurisdiction to consider this motion because the United States timely submitted a motion for reconsideration within thirty days of its 10 April 2023 receipt of the Court's decision.

STATEMENT OF THE CASE

On 27 September 2021, Appellant pled guilty to one charge and one specification of attempt to view child pornography in violation of Article 80, Uniform Code of Military Justice (UCMJ), and one charge and one specification of willful dereliction of duty for failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit, or sexually oriented material while on duty, in violation of Article 92, UCMJ. (Entry of Judgment, dated 28 October 2021, Record of Trial (ROT), Vol. 1.) The military judge sentenced Appellant to 14 months total confinement and a bad-conduct discharge. (Id.) Pursuant to a plea agreement, only 12 months confinement was approved.

Among the four issues Appellant raised to this Court in his Assignments of Error, Appellant claimed ineffective assistance of counsel against his trial defense counsel and that the military judge abused his discretion when he accepted Appellant's guilty plea. (App. Br. at 1.) Both claims were based on Appellant's claim that he was told by his counsel and believed that he

"would not have to federally register" as a sex offender for his conviction of attempting to view child pornography. (*See* App. Dec. at App. Mot. To Attach, App. A.) Appellant claimed that, upon his release from confinement, he was advised "of federal sex offender registration requirements" and was "advised I was required to federally register." (Id.) Appellant further claimed that on 9 July 2022, he "had to register as a federal sex offender." (Id.) Appellant concluded that he "would not have pled guilty nor entered into a plea agreement if I knew I would have to federally register for attempt to view child pornography." (Id.)

On 10 April 2023, this Court held that Appellant "was not properly informed—and was then misinformed—about federal sex offender registration" and therefore, "his plea of guilty was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.). This Court's discussion of "federal sex offender registration" and "the federal statutory registration framework" was based on "the federal statute, 34 U.S.C. §20901, *et seq*." Id. at *14-15. The Court further held that since "deregistering from a federal sex offender list" was not available, the "only appropriate remedial remedy is to nullify the original plea agreement and return the parties to the status quo ante." Id. at *19. This Court set aside the findings of guilty and the sentence and authorized a rehearing. Id.

STATEMENT OF FACTS

The United States incorporates the statement of facts from its original Answer to Appellant's Assignments of Error. However, additional facts, some of which were not mentioned in this Court's opinion, warrant discussion.

- *Appellant's Pretrial Priorities and Advisements*

Prior to trial, both of Appellant's trial defense counsel, Maj CB and Capt ET, discussed with Appellant the possibility of him having to register as a sex offender should he plead guilty to attempting to view child pornography. Notably, both counsel state that prior to his court-martial on 27 September 2021, Appellant "did not express concern regarding possible sex offender registration although it was discussed as a possible consequence." (*See* Decs. Of Maj CB and Capt ET.) Both highlighted that Appellant's three priorities and central focus was on "(1) ensuring his ability to provide for his three minor children, two of whom have developmental issues; (2) limiting the potential length of the confinement sentence, which was a maximum of 22.5 years of confinement if convicted; and (3) not receiving a Dishonorable Discharge." (Id.)

Both counsel also stated that they "explained to [Appellant] the possible effects of a guilty plea *which would likely include sex offender registration*." (Id.) (emphasis added.) Three days before his trial, Appellant signed an Offenses Requiring Sex Offender Processing Advisement on 24 September 2021. (*See* Dec. of Maj CB, Atch 1.) The memorandum advised Appellant that he "may be required to register as a sex offender in your state of residence," and Appellant signed an Indorsement that read, "I fully understand that if I am require to register as a sex offender, I must comply with all sex offender registration laws and I may be subject to criminal prosecution if I fail to comply with sex offender registration laws." (Id.)

As part of this advisement, counsel discussed reporting requirements with Appellant and advised Appellant "that he had to be prepared that as a condition of his plea of guilty he could be required to register as a sex offender *at both the state and federal levels*." (Dec. of Maj CB.) (emphasis added.) Maj CB notes that while Appellant had questions about reporting and registering requirements in Arizona, Appellant did not ask questions about "whether or not he

would have to register at all." Both counsel also told Appellant that he "would need to re-register with any jurisdiction he may be a part of if he moved from one state to another." (Id.)

Additionally, in their advisements to Appellant, both Maj CB and Capt ET "emphasized that a state may have registration requirements but whether the federal Department of Defense (DoD) reporting would make the notification was separate and apart. Therefore, depending on the requirements of the specific state jurisdiction and its interpretations, [Appellant] would need to ensure he was in compliance with the requirements of that state, regardless of whether the DoD proactively provided that information." (Decs. of Maj CB and Capt ET.)

Even in his oral unsworn statement given after pleading guilty, Appellant continued to show that a punitive discharge rated higher on his priority listing that sex offender registration. There, Appellant stated, "It is going to be very difficult to provide and secure health insurance for them with federal convictions and potential sex offender registration, but I know it will be even more difficult if I receive a BCD." (R. at 55-56.)

- *Appellant's Plea Agreement Incentives*

Appellant's counsel also discussed the multiple benefits Appellant gained by pleading guilty and entering into his plea agreement. Notably, two specifications, including one viewed by both defense counsel as the most serious offense of all, were dismissed. Additionally, Appellant's confinement exposure was reduced from over 22 years to just 12 to 18 months. Further, the possibility of receiving a dishonorable discharge was removed. Finally, the Government also agreed to waive and/or defer any reduction in rank and forfeitures for the longest allowable period for the benefit of Appellant's three children. (Id.) These terms conspicuously align exactly with Appellant's three main priorities pretrial that are listed above, namely (1) providing for his minor children; (2) limiting confinement; and (3) not receiving a dishonorable discharge.

- *Appellant's Added Incentive to Enter into a Plea Agreement and Pled Guilty*

The declarations from Appellant's trial defense counsel show a further incentive for Appellant to enter into a plea agreement – one which was not addressed by this Court in its opinion and is perhaps the most crucial incentive of all. In their declarations, both Maj CB and Capt ET state that the Defense's digital forensics expert "examined the hard drives seized by the Government" and "uncovered additional evidence, both [of] child pornography and child erotica images, from [Appellant's] devices that the Government had not yet discovered." (Decs. Of Maj CB and Capt ET.) Maj CB explained the critical concern of this unknown, and uncharged, evidence:

> This was incredibly important information and weighed heavily on the advice and strategy of Defense. It became part of our strategy to insulate [Appellant] from potential negative consequences of what our expert discovered. Given the totality of the evidence, including [Appellant's] sole control of his government network profile (on the Government computer), his statements to OSI, and identical search terms across both his government and personal computers, we as his attorneys presented him with the state of the evidence and each defense. We also advised him of the possible consequences of being found guilty and the litigation risk given the current state of the evidence, both known and unknown to the Government.

(Dec. of Maj CB.)

Maj CB additionally explained why entering in the plea agreement was to Appellant's extreme benefit, stating, "[Appellant] as a part of his plea would be protected from further charges/specifications that stemmed from evidence related to the crimes already charged or evidence that was in already in the possession of the Government, to include the already discussed child pornographic images found on [Appellant's] devices that were not known to the Government at this time." (Id.)

- *Appellant's Sex Offender Registration Notification Form*

Appellant bases his claims regarding having to "register as a federal sex offender" on a notification form he received from his parole officer on 12 July 2022. (App. Motion to Atch., App. A-B.) That form discusses the Sex Offender Registration and Notification Act (SORNA), that is codified at 34 U.S.C. §20901, and is the federal statute referenced by this Court in its opinion. The notification states that SORNA "established three tiers based on the nature of the sex offender's offense(s) of conviction and the sex offender's criminal history," and that the "tiers represent a minimum standard that each state must meet if it chooses to comply with SORNA." (Id. at App. B.) However, the form states that "each state may adjust the tiers to meet the state's needs," which "means that a state's registration law may be more lenient or stricter than the SORNA standard."

The form further tells Appellant that he "shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." (Id.)[1] The form continually references state jurisdictions and "state registration authorities." Notably, the form highlights that an offender must "comply with any state registration requirements that differ from those established by SORNA" and that the "offender's *duty to register as required by SORNA shall be governed by the policy and laws of the state of residence*, employment and student status." (Id.) (emphasis added.)

ARGUMENT

THIS COURT SHOULD RECONSIDER ITS CONCLUSION THAT APPELLANT'S GUILTY PLEA WAS NOT A KNOWING, INTELLIGENT ACT DONE WITH SUFFICIENT AWARENESS OF THE RELEVANT CIRCUMSTANCES AND LIKELY CONSEQUENCES.

[1] As discussed more below, SORNA defines "jurisdiction" as a state, the District of Columbia, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and federally recognized tribes." 34 U.S.C. §20911.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea de novo. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (citation omitted).

Law

Per Rule 31.2(b) of this Court's Rules, reconsideration will not be granted by this Court without a showing that one of the following grounds exists:

> (1) A material legal or factual matter was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
>
> (3) The decision conflicts with a decision of the Supreme Court of the United States, the CAAF, another service court of criminal appeals, or this Court; or
>
> (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

In reviewing the providence of a guilty plea, courts consider the appellant's "colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007). "The military judge must ensure there is a basis in law and fact to support the plea to the offense charged." United States v. Soto, 69 M.J. 304, 307 (C.A.A.F. 2011) (citing Inabinette, 66 M.J. at 321-22) (additional citation omitted). In addition, the military judge must ensure the accused understands and agrees to the terms of any plea agreement in order "to ensure that [the] accused is making a fully informed decision as to whether or not to plead guilty." Id. In United States v. Riley, CAAF held that "in the context of

a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013).

Analysis

This Court should reconsider its 10 April 2023 decision for multiple reasons. First, the Court misapplied a material legal matter, namely its analysis and application of SORNA, 34 U.S.C. §20901. As detailed below, SORNA does not create an independent federal sex offender registration system and does not, in contrast to this Court's assertion in its opinion, create a "federal sex offender list." *See* Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.) Instead, SORNA simply creates a requirement for an offender to attempt to register in any jurisdiction in which he resides or works. It is ultimately up to the states law and regulations to decide whether to actually register an offender. Thus, the requirements of SORNA effectively have no impact on Appellant's case and knowing guilty plea considering Appellant was well aware prior to trial and prior to his guilty plea that he may have to register as a sex offender in the state in which he resides.

Further, the Court overlooked or misapplied several material facts contained in the record regarding Appellant's sex offender registration advisements and his motivation for both entering into a plea agreement and pleading guilty at his trial. The declarations of Appellant's trial defense counsel make it clear that sex offender registration was not even a top three concern for Appellant as he sought to plead guilty. Moreover, and perhaps most crucially, Appellant and his entire defense team knew the Government unknowingly possessed evidence of additional and undiscovered misconduct against Appellant regarding even more child pornography and child erotica images that would likely result in additional charges against Appellant if ever discovered by the Government.

None of these factors were discussed by this Honorable Court's 10 April 2023 opinion, but yet, per Appellant's counsel, "weighed heavily" on whether Appellant knowingly and voluntarily pled guilty at his court-martial. Accordingly, this Court should reconsider its opinion.

- *SORNA's Requirements and Application*

As noted previously by this Court, SORNA "imposes requirements on covered sex offenders." United States v. Torrance, 72 M.J. 607, 614 (A.F. Ct. Crim. App. 2013); *see also* 34 U.S.C. §20901. SORNA states that an offender shall register "in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. §20913. Particularly pertinent to this case, SORNA defines "jurisdiction" as a state, the District of Columbia, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and federally recognized tribes." 34 U.S.C. §20911(10).

However, SORNA does not create an independent federal registration system. On December 8, 2021, the Department of Justice adopted a rule that expressed SORNA's requirements and explained the Department's interpretation and implementation of those requirements. The Rule highlights that "SORNA requires sex offenders to register in the states (and other registration jurisdictions) in which they reside, work, or attend school," adding that "All of the states have sex offender registration programs, which were initially established long before the enactment of SORNA. Hence, sex offenders are able to register in these existing state programs." *See* 86 FR 69856, 69868. The Rule also highlights sex offenders who are released from federal or military custody. The Rule states, "There is no separate Federal registration program for such offenders." 86 FR 69856, 69876.

Thus, as opposed to creating an independent federal registration system, SORNA instead simply creates a requirement for an offender to appear before and attempt to register as a sex offender in each jurisdiction in which he lives, works, or goes to school and attempt to register. Yet, even then, whether or not an offender is *actually* registered by the state is dependent on that individual state's laws and regulations.

The Department of Justice Office of Sex Offender Sentencing Monitoring, Apprehending, Registering, and Tracking (SMART) administers the standards for SORNA and the grant programs related to sex offender registration and notification authorized by SORNA. U.S. Dep't of Justice, SMART Office, http://smart.ojp.gov/about (last visited 7 May 2023.) The SMART office has stated that "[f]ederal courts have interpreted SORNA as directly imposing a duty on a person to attempt to register if they meet the federal definition of 'sex offender'[,]" but "a jurisdiction will not register an offender unless *that jurisdiction's laws* require that the offender be registered." U.S. Dep't of Justice, SMART Office, *Sex Offender Registration and Notification in the United States*: Current Case Law and Issues 5-6 (August 2013), http://www.smart.gov/caselaw/handbook_august2013.pdf (emphasis in original).

Most recently, the SMART office has stated, "In practice, unless a jurisdiction's laws require an offender to register, a jurisdiction generally will not register the offender. As a result, it is possible that an offender will be required to register under SORNA, but, because the jurisdiction's laws do not require registration for the offense of conviction, the jurisdiction where the offender lives, works, or attends school will refuse to register the offender." U.S. Dep't of Justice, SMART Office, *Sex Offender Registration and Notification in the United States*: Case Law Summary (July 2022), https://smart.ojp.gov/doc/sorna-case-law-summary-july-2022.pdf (last visited 7 May 2023).

The Fourth Circuit Court of Appeals has recognized this distinction, noting that while "SORNA imposes a duty on the sex offender to register, it nowhere imposes a requirement on the State to accept such registration." Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010).

The Department of Justice's 2021 Rule also highlights this scenario where a "jurisdiction's law or practice may constrain its registration personnel to register only sex offenders whom its own laws require to register. In such a case, it is impossible for the sex offender to register in that jurisdiction, though subject to a registration duty under SORNA. This is so because registration is by its nature a two-party transaction, involving a sex offender's providing information about where he resides and other matters as required, and acceptance of that information by the jurisdiction for inclusion in the sex offender registry. If the jurisdiction is unwilling to carry out its side of the transaction, then the sex offender cannot register." 86 FR 69856, 69868.

Thus, while an offender may have an obligation pursuant to SORNA to register as a sex offender, any such registration would occur at the state-level and be dependent on that individual states' laws and regulations. In other words, the practical effect of whether an offender is an actual registered sex offender ultimately remains a state-level function. This is especially true considering that only 18 states have substantially implemented SORNA requirements. U.S. Dep't of Justice, SMART Office, https://smart.ojp.gov/sorna/substantially-implemented (last visited 7 May 2023). Notably, Arizona, the state involved in Appellant's case (that is, where he discussed living with his family post-confinement and the state Appellant included on his Request for Appellate Defense Counsel form) has not substantially implemented SORNA.

Even the notification form which seemingly gave rise to Appellant's belief that he had to "federally register" as a sex offender plainly states that an offender shall register in a "jurisdiction"

(i.e., a state), each jurisdiction where the offender resides, continually references state jurisdictions and "state registration authorities," and highlights that an offender must "comply with any state registration requirements that differ from those established by SORNA" and that the "offender's *duty to register as required by SORNA shall be governed by the policy and laws of the state of residence*, employment and student status." (App. Motion to Atch., App. B.) (emphasis added.)

Finally, SORNA does not create an independent "federal sex offender list" as this Court suggests in its opinion. *See* Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.). While SORNA did create a National Sex Offender Registry and a National Sex Offender Public Website, both of these systems simply aggregate information from the state and other jurisdictions own sexual offender registry lists. They do not create an independent or separate list based on a supposed "federal registration." The National Sex Offender Registry (NSOR), which is purely a federal law enforcement database that is available to only law enforcement and authorized criminal justice agencies, is a "national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry." 34 U.S.C. §20291; *see also* Federal Bureau of Investigation, https://www.fbi.gov/how-we-can-help-you/safety-resources/scams-and-safety/sex-offender-registry (last visited 7 May 2023).

The National Sex Offender Public Website (NSOPW) is simply an aggregate of each jurisdiction's public registry websites. As the SMART office, who is in charge of operating the site, states, "NSOPW is not a national database of all registered sex offenders and only information that is publicly listed on a jurisdiction's public sex offender registry website will display in NSOPW's search results. Each jurisdiction owns and is responsible for the accuracy of the information displayed on NSOPW . . .." U.S. Dep't of Justice, SMART Office, *Sex Offender Registration and Notification in the United States*: Case Law Summary (July 2022),

https://smart.ojp.gov/doc/sorna-case-law-summary-july-2022.pdf (last visited 7 May 2023). The SMART office's NSOPW website provides similar language, stating, "NSOPW presents the most up-to-date information as provided by each jurisdiction. Information is hosted by each jurisdiction, not by NSOPW.gov or the federal government. U.S. Dep't of Justice, SMART Office, https://www.nsopw.gov/en/About (last visited 8 May 2023).

- *Application of SORNA to Appellant and this Court's Misapplication of SORNA*

Here, Appellant was made well aware prior to his court-martial that he would be subject to state laws and regulations regarding sex offender registration. Appellant's trial defense counsel state that they advised Appellant on this issue. Appellant's 24 September 2021 memorandum with his trial defense counsel advised that he "must comply with all applicable laws regarding sex offender registration for the jurisdictions in which you reside, are employed, vacation, or are a student." Notably, both counsel specifically emphasized that state requirements were separate and apart from DoD reporting requirements and that Appellant himself would "need to ensure he was in compliance with the requirements of that state." (Decs. of Maj CB and Capt ET.) Appellant's own declaration to this Court admits that he "understood that my federal conviction and potential sex offender registration requirements imposed by various States would impact where we could live and what jobs I could do." In other words, Appellant cannot contend that he did not know that he would be subject to any state jurisdiction's requirements for sex offender registration.

At his court-martial, discussion about "federal registration" centered around whether the Department of Defense Instruction (DoDI) would require the military to report Appellant's conviction. This Court's opinion even emphasized how the discussion centered on the military aspect of federal reporting when it quoted and emphasized the military as follows:

> MJ: And you understand that, [Appellant], that every state is different? When we talk about sex offender reporting and registration requirements, we are discussing on the federal level what the military would put on the confinement order and would report. *And it doesn't meet the federal requirements when it comes to the military*, but we can't necessarily say what effect it might have in every state.
>
> ACC: Yes, Your Honor.
>
> (Omission in original) (emphasis added).

Lara, No. 2023 CCA LEXIS 160, at *8-9 (unpub. op.) Discussion from all parties agreed that the DoDI did not apply in Appellant's case.

SORNA and its requirements were not specifically discussed at Appellant's court-martial. Appellant's conviction for attempting to view child pornography falls under SORNA's definition of a "specified offense against a minor," as it involves "any conduct that by its nature is a sex offense against a minor." *See* 34 U.S.C. §20911(7).[2] Thus, SORNA does apply in Appellant's case.

However, as shown above, the practical aspects of Appellant's conviction remain unchanged because of SORNA. Here, while SORNA requires Appellant to appear before each jurisdiction in which he plans to work, live, or go to school and attempt to register, whether or not Appellant actually becomes a registered sex offender is still wholly within the jurisdiction's (i.e., the state's) purview based on that jurisdiction's own law, regulations and requirements. Thus, whether he knew about the requirements of SORNA or not, the end result is the same - Appellant would still be subject to state laws and regulations on sex offender registry, a fact, as

[2] SORNA's definition of "sex offense" also includes any "military offense specified by the Secretary of Defense." 34 U.S.C. §20911(5)(A)(iv). However, the current Department of Defense Instruction, DoDI 1325.07, does not specify the offense of viewing child pornography.

detailed above, Appellant was well aware of prior to his court-martial when he entered into his plea agreement.

Further, Appellant's colloquy at his trial with the military judge, along with his counsel and Government counsel, further show he was fully on notice regarding state registration. When asked by the military judge if there had been discussion about sex offender registration, Appellant's counsel stated, "Yes, Your Honor, out of an abundance of caution with regard to the state rules, we did discuss the possibility of sex offender registration. (R. at 45.) Later, the circuit trial counsel highlighted that the DoDI "merely indicates what sort of offenses the federal government will actively report to the state. Not necessarily what a particular state's individual reporting requirements may be." (R. at 46.) The circuit trial counsel continued, "And it is our understanding that the defense has advised [Appellant] that even under the terms of the plea agreement, it is potentially possible that he may have to register given whatever law of the state he may end up residing in." (R. at 46-47.)

Appellant's defense counsel immediately agreed with this assessment, stating, "Your Honor, we did give that advice in writing. [Appellant] has been advised that a state may have different requirements than the federal and that this is based off of DoD reporting and federal reporting, as we have advised as you have." (R. at 47.) Thus, the record is clear that Appellant knew prior to being found guilty that he would be subject to state laws and regulations on sex offender registry.

Moreover, as shown above, Appellant's claims that he had to "federally register as a sex offender" and that he did, in fact, "register as a federal sex offender" on 9 July 2022 are incorrect. (*See* App. Dec. at App. Mot. To Attach, App. A.) There is no independent federal registry for sex offenders or process to file "as a federal sex offender." As even the Department

of Justice has stated, SORNA created no such process. Unfortunately, Appellant's misstatements have led this Court to believe that he is now part of a "federal sex offender list" from which he is unable to "deregister[]." Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.). As shown, however, SORNA does not create an independent federal registry. Instead, SORNA simply requires an offender to attempt to register at the jurisdiction level. Moreover, SORNA does not create a "federal sex offender list," as the two databases created by SORNA (the NSRO and the NSOPW) only aggregate information obtained solely from state or other jurisdictions own sex offender registry lists.

Here, Appellant knew he was subject to the laws and regulations of any state in which he lived regarding sex offender registry. While Appellant now claims he was unaware of SORNA requirements, the real-world implications of those requirements do not change what Appellant always knew he would be subject to – the sex offender registry laws and regulations of each state. Further, Appellant's claim that he actually "had to register as a federal sex offender" is now shown to be untrue.[3]

[3] As noted in the Government's original Answer brief in this case, Appellant never provided any actual proof that he had registered as a sex offender anywhere, let alone as a "federal sex offender." Appellant has still yet to provide any proof. Moreover, while Appellant does not contest or question his known requirement to register in the state in which he lives, it appears that Appellant has not yet registered as a sex offender in Arizona. A search of Arizona's state registry, located at https://www.azdps.gov/services/public/offender, found no listing for Appellant.

Additionally, this Court's opinion includes a footnote stating, "The Government does not challenge Appellant's assertions that he was appropriately required to register with federal authorities." Lara, 2023 CCA LEXIS 160, at *16 n.6 (unpub. op.) Though the Government's original Answer focused on Appellant's inability to prove he had ever actually registered as a "federal sex offender," the Government's silence on whether Appellant was required to register with federal authorities should not have been interpreted by this Court as either conceding or "not challeng[ing]" that claim. This Motion for Reconsideration should cement the Government's firm challenge to "Appellant's assertions that he was appropriately required to register with federal authorities."

As shown, this Court misapplied its analysis of SORNA, as well as its application to Appellant, in its opinion and holding that Appellant was required to "federally register," that he was "required to register with federal authorities," and that he was seemingly unable to "deregister[] from a federal sex offender list." Accordingly, this Court should reconsider its finding that Appellant's guilty plea was not a "knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.).

- *This Court's Misapplication and Omission of Appellant's Plea Agreement Motivations and Alleged Concern for Sex Offender Registration*

After finding Appellant's plea was not a knowing and intelligent act, this Court further found that Appellant "would not have entered into a plea agreement as to either offense knowing the consequences of a plea of guilty as to the one offense." Lara, 2023 CCA LEXIS 160, at *18 (unpub. op.) This Court further stated, "Neither the Government nor trial defense counsel rebuts his claim with any evidence for us to consider." Id. The Government respectfully disagrees with the Court's position as the declarations from Appellant's trial defense counsel, which were submitted by the Government in its Answer, completely rebut Appellant's new-found claim.

A full review of the facts and circumstances of this case show this Court's opinion is incorrect. To start, as shown above, the entire premise of Appellant's claim, that being he would not have entered into a plea agreement if he knew he would have to "federally register," is incorrect as there is no federal registration. Yet, even if there was, Appellant self-serving claim that he would not have pled guilty because of registration requirements is unsupported by the record.

Both of Appellant's trial defense counsel stated that prior to his court-martial on 27 September 2021, Appellant "did not express concern regarding possible sex offender registration

although it was discussed as a possible consequence." (*See* Decs. Of Maj CB and Capt ET.) Further, both highlighted that Appellant's three priorities and central focus was on (1) providing for his family; (2) limiting his confinement sentence; and (3) not receiving a Dishonorable Discharge." (Id.) Appellant's plea agreement provided resolution to those exact three priorities: It waived and/or deferred his reduction in rank and forfeitures to the benefit of his family, it limited his confinement from 22 years to just 12 to 18 months, and it removed a dishonorable discharge from consideration. But the plea agreement did still more as it dismissed two specifications, including one viewed by both defense counsel as the most serious offense of all

Perhaps most importantly, the plea agreement shielded Appellant from additional prosecution for additional child pornography. This was key for the Defense as they (including Appellant) knew that hard drives in the possession of the Government contained additional child pornography and child erotica images that had not been discovered by the Government. In other words, the Defense knew additional charges and specifications were likely if the Government ever found those additional images. As Maj CB stated, "This was incredibly important information and weighed heavily on the advice and strategy of Defense," adding, "[Appellant] as a part of his plea would be protected from further charges/specifications that stemmed from evidence related to the crimes already charged or evidence that was in already in the possession of the Government, to include the already discussed child pornographic images found on [Appellant's] devices that were not known to the Government at this time." (Dec. of Maj CB.)

Thus, Appellant had extreme incentives to enter into his plea agreement regardless of whether he would have to "federally register" as a sex offender. Aside from the fact that both of his counsel state that sex offender registration was not a concern for Appellant (it was not in his top three priorities), the plea agreement met Appellant's actual top three priorities while also

shielding him from potentially more charges and specifications (and the added exposure to more confinement and a dishonorable discharge) due to the undiscovered evidence in the Government's possession.

All of this information is contained within the declarations of Appellant's trial defense counsel and were before this Court when it issued its decision. Yet, this Court stated that "[n]either the Government nor trial defense counsel rebuts [Appellant's] claim." As shown, this Court overlooked or misapplied several material facts contained in the record regarding Appellant's motivation for both entering into a plea agreement and pleading guilty at his trial. This evidence shows Appellant would have pled guilty regardless of any sexual offender registry requirements. Accordingly, this Court should reconsider its opinion.

Finally, this Court misapplied its analysis and use of United States v. Perron, 58 M.J. 78 (C.A.A.F. 2003). In its opinion, this Court correctly cited Perron for the contention that "[W]here there is a mutual misunderstanding regarding a material term of a pretrial agreement, resulting in an accused not receiving the benefit of his bargain, the accused's pleas are improvident" and the law requires remedial action "in the form of specific performance, withdrawal of the plea, or alternative relief." Lara, 2023 CCA LEXIS 160, at *14 (unpub. op.) (*citing* Perron, 58 M.J. at 82).

However, this Court misapplied Perron because the issue of whether or not Appellant would have to "federally" register as a sex offender was not a material term of his plea agreement. Undoubtedly, his plea agreement had many terms that were very much material, and favorable, to Appellant, and ones that he specifically sought out. These terms included a reduction in confinement exposure, removing a dishonorable discharge as a possible punishment,

dismissing multiple specifications, and waiving and/or deferring forfeitures. Yet, the plea agreement was silent as to sex offender registration.

Over a decade ago, the Coast Guard Court of Criminal Appeals found that sex offender registration did amount to a material term in a plea agreement even though it did not appear in the plea agreement itself. *See* United States v. Molina, 68 M.J. 532, 534 (C.G. Ct. Crim. App. 2009). However, the Court's decision was based on "post-trial affidavits and Government concessions" that showed assurances by trial counsel and defense counsel that the appellant would not have to register as a sex offender in the state of California "was the primary concern of Appellant in making his decision to sign the pretrial agreement and plead guilty." Id. at 535. Notably, on appeal, the Government also conceded in its brief that avoidance of sex offender registration was a material term of that plea agreement.

Here, no such primary concern from Appellant exists. Again, while Appellant now contends that sex offender registration was his primary concern, the declarations of his trial defense counsel paint a much different picture. Instead, Appellant's primary concerns were confinement, a potential dishonorable discharge, and shielding himself from added prosecution because of undiscovered evidence already in the Government's possession. Put simply, whether or not Appellant would have to "federally register" as a sex offender was not a material term of his plea agreement. Thus, Perron was misapplied in this case.

Yet, even if this Court finds this was a material term, the Court must still reassess its application of Perron in the face of what has now been shown – that there is no federal sexual assault registry and no "federal sex offender list" for Appellant to "deregister[] from. Considering the end result discussed above, namely that whether required by SORNA or not, Appellant is still subject to the registration laws of the state in which he resides or works

(which is exactly what he knew and understood prior to trial), no remedial action is necessary pursuant to Perron.

As a final point, Appellant used the possibility that he would have to register as a sex offender as a mitigating factor in his unsworn statement. Now, in contradiction of his acknowledgement in his unsworn statement, he has asked for and been granted appellate relief because he claims he did *not* know that he might have to register as a sex offender. This Court should not sanction such an incongruous result, especially where Appellant has not provided this Court any evidence that he has actually registered in any jurisdiction as a sex offender.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court to reconsider its 10 April 2023 decision.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
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[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 10 May 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **DOUGLAS G. LARA,** United States Air Force *Appellant*	)	**OPPOSITION TO UNITED STATES MOTION FOR RECONSIDERATION** Before Special Panel No. ACM 40247 17 May 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(c) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant Douglas G. Lara, Appellant, hereby enters his opposition to the United States Motion for Reconsideration (hereinafter "Gov. Recon.") as this Court's 10 April 2023 opinion in the above captioned case neither misapplied legal principles nor overlooked factual matters presented at the court-martial. Additionally, Appellant relies on the facts and arguments made in his initial brief, filed on 6 August 2022 (hereinafter "AOE") and is reply brief, filed 17 October 2022 (hereinafter "Reply").

STATEMENT OF FACTS

The state where Appellant presented upon release from confinement is not documented in this record. Appellant's AF Form 304 only documents an address in Arizona where Appellant can receive correspondence regarding his post-trial and appellate rights. ROT Vol. 1, Attachments and Allied Papers.

The Government does not contest SORNA applies to Appellant's conviction for attempt to view child pornography. Gov. Recon at 15.

ARGUMENT

THERE WAS NO MATERIAL LEGAL OR FACTUAL MATTER OVERLOOKED IN THE COURT'S DECISION

A guilty "plea is more than an admission of past conduct; it is [an accused]'s consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury and judge." *United States v. Riley*, 72 M.J. 115, 120 (C.A.A.F. 2013) (internal quotation marks and citation omitted). Such waivers "not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness* of the relevant circumstances and likely consequences." *Id.* (internal quotation marks and citations omitted) (emphasis added). Sex offender registration requirements are some of those relevant circumstances and likely consequences. *See id.* at 121 ("[W]e hold that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.").

This Court, in arriving at the conclusion Appellant's guilty plea was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences considered the three different, but interrelated, aspects of sex offense registration (1) the federal statute (34 U.S.C. § 20901, *et seq*.) which requires mandatory sex offender registration for those who are convicted of offenses within the statue's scope; (2) DoDI 1325.7, which identifies offenses that trigger mandatory sex offender reporting by the DoD; and (3) state laws concerning registration for qualified sex offenses. *See United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 160, at *12 (A.F. Ct. Crim. App. 10 April 2023); *United States v. Miller*, 63, M.J. 452, 459 (C.A.A.F. 2006); *United States v. Torrance*, 72 M.J. 607, 611-12 (A.F. Ct. Crim. App. 2013).

In its Motion for Reconsideration, the Government references the advice Appellant was given related to the applicability of the federal statute/SORNA in terms of "might" "may have to" "could" and "possibility" as well as the advice generally, that it is all dependent on state laws. Gov. Recon. at 4, 5, 9, 16, and 22. They do not address the trial defense attorneys' and the military judge's assertions, on the record, that the federal statute and the DoDI was not triggered by this offense. *Id.* This minimization of the requirements of SORNA and the advice that is required regarding the applicability of SORNA negates the Court of Appeals for the Armed Forces (CAAF's) acknowledgement of the significant burden imposed by SORNA, that is, being labeled as a sex offender and presenting himself to every Sherriff's office and/or whatever law enforcement agency implements SORNA in every jurisdiction in which he lives, works, or goes to school is no longer a collateral consequence of a guilty plea. *See United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013).

Notably, the Government's brief is silent to the duty laid out in *Miller* and *Torrence* as it relates to the failure of Appellant's trial defense team to meet their obligation to properly advise Appellant as to the applicability of both the federal statute and the DoDI but rather spoke at lengths as to the third aspect of sex offense registration, that is, their general advice that state laws could vary and may lead to a registration requirement as proof of sufficient advice to the actuality that SORNA did apply and he was bound by those requirements. Gov. Recon. at 14-15.

This Court correctly found that Appellant was both not properly informed and then misinformed about federal sex offender registration, and that advice was not sufficient for his guilty plea to be knowing. *Lara*, 2023 CCA LEXIS 160 *18. This is consistent with *Miller* and *Torrance*, wherein trial defense counsel has the obligation to inform an accused prior to trial as to charged offenses in the DoDI and the federal statue that "require[s] mandatory reporting and

registration for those who are convicted of offenses within the statute's scope." *Miller*, 63 M.J. at 456 (quoting *Torrance*, 72 M.J. at 611-12). This is notable because the applicability of SORNA means that Appellant has to register in *every* state in which he would choose to initially report post-release. 34 U.S.C. §20913 provides that "an offender shall register 'in each jurisdiction where the offender resides…."). *Id.* This is evidenced by the paperwork he received upon his release, directing him to register. Appendix B, Appellant's Motion to Attach out of Time, dated 7 August 2022. There is no evidence in the record to the contrary, and the Government agrees SORNA is applicable. Gov. Recon. at 15. As a result, based on his plea to attempted viewing of child pornography, there is no place he is not required to report for registration under SORNA – his conviction for that offense met the minimum threshold for sex offender registration and as a result, Appellant had a federally-imposed reporting requirement.

The federally-imposed requirements of SORNA exist notwithstanding the procedural nature of the any state's involvement under SORNA, which relates to the maintenance of the sex offender registrations in their jurisdiction. 34 U.S.C. §20912 mandates that jurisdictions (generally, states, U.S. territories and in some instances, tribal lands), shall maintain a jurisdiction-wide sex offender registration (i.e., list or database) conforming to the requirements of this subchapter to meet the purpose of SORNA, found in § 20901, which is the establishment of a comprehensive *national* system for the registration of sex offenders. The advice Appellant received at trial was that this federal requirement did not exist. R. at 44-45, 47. The Government concedes that SORNA and its requirements were not specifically discussed at Appellant's court-martial. Gov. Recon. at 15. Advice that some states may independently review his conviction and determine if *their state law* would also require him to register or not does not equate to advice that the SORNA statute *requires* him to register.

Regardless, SORNA was triggered and he was advised the opposite prior to his entry of pleas by the military judge and as this Court noted, by his trial defense counsel (because they believed this analysis may have been wrong and purposefully chose to keep quiet on the record)" *See Lara*, 2023 CCA LEXIS 160 at *15.

While the Government asserts SORNA is just an 'attempt' to create a requirement to register in any jurisdiction in which he resides or works, and that it is "ultimately up to the state's law and regulations to decide whether to actually register an offender," these assertions are inaccurate and are not supported by the record. *See* Gov. Recon. at 9. Appellant was advised prior to release from confinement, under SORNA, found at 34 U.S.C. § 20901, et seq, that he "shall register, and keep the registration current, in each jurisdiction where the offender resides…" Appendix A and B, Motion to Attach OOT, dated 7 Aug 2022. Additionally, he was directed to "maintain contact with the state registration authorities and comply with any state registration requirements that differ from *those established by SORNA*." *Id.* (emphasis added). That means he was subject to both the requirements established by SORNA and additional ones imposed by the state, but not that the state could remove the applicability of the federal statute to his conviction for this offense. This was not discretionary for Appellant – if Appellant failed to comply with the registration requirements, he could be subject to new criminal charges per 18 U.S.C. § 2250. *Id.* Additionally, Appellant requests this Court disregard additional speculative facts argued by the Government in its motion, which are entirely outside the record. Specifically, the Government asserts that Appellant is not registered in Arizona. Gov. Recon. at 17. However, there is no evidence before this Court that he was, in fact, required to register in Arizona. First, the Government has made an assumption about his initial state of release. Second, this evidence does not supplement facts in the record applicable to the issue before the Court, and as such, this

evidence has not been properly presented to this Court for consideration in this matter. *See United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). Third, nothing about a state's action(s) or inaction(s) on this matter changes the imposition under federal law on Appellant and the federal criminal consequences he is subject to if he chooses to ignore them. That is the only issue before this Court in terms of resolving whether his guilty plea to attempted viewing of child pornography was knowing – what actually happened and what he was actually advised with regard to the applicability of SORNA.

What a state may independently require and advice on the potential existence of those requirements does not equate to advice on the applicability of the federal statue and registration obligations. Federal courts have held that a sex offender's obligations under SORNA are independent of any duties under state law and "SORNA bind[s] all individuals 'convicted' of sex offenses, not those just with corresponding state obligations"). *Willman v. Att'y Gen. of United States*, 972 F.3d 819, 823 (6th Cir. 2020).[1]

[1] *See also*, *United States v. Paul*, 718 F. App'x 360, 363-64 (6th Cir. 2017), *cert denied*, 140 S. Ct. 342 (2019) (holding that "SORNA imposes [registration] duties on *all* sex offenders, irrespective of what they may be obligated to do under state law); *United States v. Del Valle-Cruz*, 785 F.3d 48, 55 (1st Cir. 2015)(holding that the "triggering event for the duty to register [under SORNA] is a sex offense conviction, not a state sentencing requiring registration"); *United States v. Billiot*, 785 F.3d 1266, 1269 (8th Cir. 2015) ("SORNA imposes an independent *federal* obligation for sex offenders to register that does not depend on, or incorporate, a state-law registration requirement.") *United States v. Juvenile Male*, 670 F.3d 999, 1007 (9th Cir. 2012) ("*Juvenile Male III*") (holding that SORNA's "requirement that the defendants register as sex offenders is independent from any requirement under state law"); *United States v. Pendleton*, 636 F.3d 78, 86 (3d Cir. 2011) (holding that a sex offender's duty to register under SORNA is not dependent upon his duty to register under state law and sex offender was required to register under SORNA even though he had no duty to register under Delaware law); *Kennedy v. Allera*, 612 F.3d 261, 267-68 (4th Cir. 2010) (concluding that SORNA imposes obligations on a sex offender that are independent of state law and holding that sex offender had an independent duty to register under SORNA and he was not relieved of

Moreover, the Government asserts that the Court's reliance on the existence of the federal registry or system is a material fact that was overlooked or misapplied in setting aside his Appellant's conviction. Gov. Recon. at 1. SORNA, as outlined above, does create a national registration by aggregating each jurisdiction's registration/list in one location, and it also sets forth a minimum standard of registration information and requirements for offenses which meet the definition of a sexual offense under the Code with a federal reporting requirement. *See* 34 U.S.C. 20901 et seq, wherein a national registry is mandated at § 20921, found at www.nsopw.gov/ (last accessed 13 May 2023); *see also* § 20931, wherein the "*Secretary of Defense shall provide to the Attorney General the information described in § 20914* (that is, in this case, Appellant's registration information provided to the U.S. Attorney General by the DAF) of this title *to be included in the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public website if ....required to register under this subchapter*." SORNA does set forth a Federal Government reporting requirement, which is also outlined in the DoDI.

What the Government still did not address, and cannot reconcile, is the fact that Appellant never was advised properly on the federal statute. *See Lara*, 2023 CCA LEXIS 160 at *15, looking

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that duty just because he initially was unable to register in Maryland because Maryland law did not require registration); *Andrews v. State*, 978 N.E.2d 494, 502 (Ind. Ct. App. 2012) (recognizing that SORNA may require an offender to register as a sex offender even if Indiana law does not and that he "may have a federal duty to register under [SORNA] if he engages in interstate travel, and could be subject to prosecution . . . under 18 U.S.C. § 2250, if he fails to do so"); *Dep't of Pub. Safety & Corr. Servs. v. Doe*, 94 A.3d 791, 807 (Md. 2014) (holding that a sex offender has an independent duty to register under SORNA while also recognizing that the state is not required to register the offender if registration of the offender would be contrary to state law); *Doe v. Lee*, 296 S.W.3d 498, 500 (Mo. Ct. App. 2009) (holding offender has an independent duty to register as a sex offender in Missouri under SORNA and the "obligation operates irrespective of any allegedly retrospective state law").

at the pretrial written advice and declarations of both trial defense counsel. However, in this case, we also have the error by the Military Judge, when he incorrectly asserted at trial that "this offense does not require sex offense registration and reporting" as confirmed by trial defense that they "advised as he had." R. at 44-45, 47. Ultimately, a military judge has a duty to ensure trial defense counsel has complied with their obligation to advise an accused concerning sex offender registration requirements, which is consistent with the military judge's responsibilities while conducting a plea inquiry. *Riley*, 72 M.J. at 122. "Given the lifelong consequence of sex offender registration, which is a particularly severe penalty," a military judge's failure to ensure an appellant understood the sex offender registration requirements of his guilty plea resulted in a substantial basis to question the providence of an appellant's plea. *Id*. (internal quotation marks and footnote omitted).

As detailed in prior filings and adopted by this Court, both trial defense counsel asserted that they advised Appellant prior to plea agreement negotiations of the possible effects of a guilty plea, "which would *likely* include sex offender registration." Declaration of Maj CB, at 2; Declaration of Capt ET, at 2 (emphasis added). Capt ET asserted the plea agreement was signed by Appellant on 7 September 2021, twenty days prior to the trial date of 27 September 2021. Declaration of Capt ET, at 2. It is unclear whether this was based on state or federal law – but regardless it is not an affirmative statement this offense requires registration.

Trial defense counsel consistently directed the discussion to whether any state rule would require registration at trial: "out of an abundance of caution with regard to state rules, we did discuss the *possibility* of sex offender registration." R. at 45. Capt ET also represented to the Court that she "agree[d]with the court's and the government's interpretation that this offense that Sergeant Lara is pleading guilty to *does not require* sex offenses registration and reporting." R.

at. 45. Maj CB affirmatively stated to the court that they gave their advice in writing, but also that "we have advised as you have" [that is, this offense did not trigger federal registration and reporting]. R. at 47. Both Maj CB and Capt ET provided evidence that their statement to the court, that they "advised as [the court] did," was given because they were hoping to afford Appellant a "loophole" in the triggering of sex offender registration and reporting requirements. Declaration of Maj CB at 4; Declaration of Capt ET at 3. Their advice, however, was silent as to the applicability of SORNA. Instead, their advice addressed the DoDI, stating the DoDI was not triggered and the Air Force would not report his conviction to any state/local law enforcement officials, which would afford him this loophole. Their belief in this "loophole" is evidence that they did not discuss or properly advise Appellant on SORNA, given that is the purpose and effect of SORNA, to defeat such loopholes.[2] *See* 34 U.S.C. 20901.

These oscillating and inconsistent advisements give a clear picture of what Appellant understood at the time his guilty plea was accepted related to whether the federal statute would apply to the offenses to which he was pleading guilty, that is, there was no affirmative duty for him to register based on either federal or state laws, and that whether he had to register was entirely dependent upon state laws. His understanding at the time of his trial, based on all the advice he had up to that point was "it depends" and "there was no federal registration and reporting requirements." This is a far cry from the reality – his duty to present in every jurisdiction as a sex offender because SORNA mandated it. Appendix A and B, Motion to Attach Out of Time, dated 7 Aug 2022. The Government highlights the statement by Appellant in his unsworn that he could

[2] "SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA aims to close potential gaps and loopholes that existed under prior law and generally strengthens the nationwide network of sex offender registration and notification programs." https://smart.ojp.gov/sorna, last accessed 15 May 2023.

face "potential sex offender registration" as evidence that his Trial Defense Counsel's advice was sufficient. See Government Answer (hererinafter "Answer"), dated 11 Oct 2022 at 12. However, the possibility of sex offender registration versus an actual requirement to register matters – it is a reasonable request for information about sex offender registration whether it is actually triggered by the offense. *United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012) (emphasis added).

The Government cannot overcome the failure of the trial court and his trial defense counsel to inform Appellant that his plea of guilty would require sex offender registration under SORNA given the oscillating and conflicting advice he received. Failure to inform an accused that the plea will require sex offender registration impacts whether the plea was knowingly made. *Riley*, 72 M.J. at 121. This deficiency results in a substantial basis to question the providence of his plea.

The Government's assertion in the motion to reconsider that there was a misapplication or misunderstanding of a material fact as it relates to motivations for entering into the plea and/or agreement to plead guilty are inapplicable. Gov. Recon. at 9. No further analysis into the motivations and strength of the evidence is needed, nor is it relevant to whether the advice Appellant was given was sufficient to meet the threshold of a knowing guilty plea. *Riley* makes it clear the military judge must ensure an appellant understands sex offender registration requirements in order for a guilty plea to be knowing; the Government's assertion that Appellant was incentivized to enter into a plea agreement and/or to plead guilty based on the strength of the evidence does not equate to any level of understanding of sex offender registration requirements as a result of that agreement or guilty plea. That alone is the central issue in resolving this matter, this Court did not overlook a material legal or factual matter in resolving this issue.

The Government also questions whether this Court correctly applied the standard for relief. Gov. Recon. at 20. "The remedy for finding a plea improvident is to set aside the finding based

on the improvident plea and authorize a rehearing." *Riley*, 72 M.J. at 122 (citations omitted). In this case, although there was a plea to two different charged specifications, the plea to only one is at fault – the question this Court had to decide was what remedy was available if Appellant's plea agreement and plea to one of multiple charged offenses was not knowing?

Appellant made clear in his declaration that he would not have pleaded guilty to nor entered into a plea agreement if he knew he would have to federally register, that is if SORNA applied to his charged offenses. Appendix A, Motion to Attach out of Time, dated 7 Aug 2022. This Court correctly took that to mean Appellant would not have entered into a plea agreement nor pleaded guilty as to the attempt to view child pornography charge and *the other charged offense.* This is the issue that is and remains unrebutted by the Government and trial defense counsel. That is, but for Appellant's decision to plead guilty based on the incorrect advice that SORNA would not apply he would not have entered into an agreement on or pleaded guilty to *any* of the charged offenses. Rather, it is and still remains uncontested by the Government and trial defense counsel that Appellant's decision to plead guilty to and enter a plea agreement related to Charge I, Specification 2 and Charge II, specification 2 remain intertwined. Had Appellant received the correct advice on sex offender requirements under SORNA, he would not have pleaded guilty to or entered into a plea agreement *for any* of the charged offenses.

The standard relied on by this Court to resolve the issue of what relief is available when a term of a pretrial agreement that is not upheld (that, is, the plea to guilty is not knowing), is found in *Perron*: specific performance, withdrawal of the plea, and alternative relief. *See* 58 M.J. at 82. The Court correctly found specific performance was not available, in terms which they described as "deregistering from a federal sex offender list" – stated another way – removing the requirements of SORNA from Appellant's conviction. *Lara*, 2023 CCA LEXIS 160 at *18.

In terms of relief, the Government has asserted that the Court's statement's that Appellant is on a federal sex offender list, from which he cannot de-register is a material legal or factual error that should be reconsidered. Gov. Recon. at 17-20. This is a matter of semantics – the Government acknowledged the applicability of SORNA to Appellant's charged offense, namely, that attempt to view child pornography does meet the statutory definition for a criminal offense that is a specified offense against a minor. *Id*. at 15. This assertion, then that Appellant cannot "deregister from" any federal sex offender list or database is done in error is inconsistent with the Government's acknowledgement of the applicability of SORNA. If the statute does apply, there is nothing within the federal statute (SORNA) that provides for "removal" from those requirements to present and be registered in any jurisdiction which he lives, works, or goes to school. *See* 34 U.S.C. 20901 et. seq. As outlined above, this federally-imposed duty exists independent of, and separate from, any state requirements or actions. The Court correctly found specific performance is not possible. *Lara*, 2023 CCA LEXIS 160 at *18. If neither specific performance nor alternative relief is available, the Court must nullify the original pretrial agreement, and return the parties to the status quo. *Perron*, 58 M.J. at 86.

This Court applied the correct standard under *Perron*. While not specifically stated in the pretrial agreement, Appellant has made clear what he understood at the time he decided to plead guilty regarding SORNA – nothing in any of those advisements clearly stated to him that he would have to present as a sex offender after release from military confinement post-conviction, the advice and understanding which is enumerated multiple times throughout the record. Most significantly, however, is the term of the agreement which renders the agreement void based on the lack of advice that SORNA is applicable: "my counsel fully advised me of the nature of the charges against me, the possibility of my defending against them, any defense which might apply,

and the *effect of the guilty pleas which I am offering to make*…" App. Ex. I, page 3. This Court found he had no such knowledge of the effect of his guilty plea – which is affirmatively required for the military judge to accept such an agreement and ultimately, an entry of a plea to guilty. *See Lara,* 2023 CCA LEXIS 160 at *18; *Riley*, 72 M.J. 115, 120 (C.A.A.F. 2013); *Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006); *Torrance*, 72 M.J. 607, 611-12 (A.F. Ct. Crim. App. 2013). "To resolve an issue with a term or condition in a pretrial agreement that does not appear in the agreement itself, if it involves the constitutional rights of a military accused, we look to the terms of the agreement, but also to the accused's understanding of the terms of the agreement as reflected in the record as a whole." *United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006). The terms of the agreement include, among other provisions, that Appellant was fully advised on the nature of the charges *and the effects of the guilty plea*. Appellant was not fully advised on the effects of the guilty plea. Further, Appellant's declaration is factually adequate on its face to state a claim of legal error and the issue of whether Appellant would not have pleaded guilty to or entered into a plea for *any of the charged offenses* if he had been properly advised of SORNA's applicability to one is not contested by the Government. Without evidence to the contrary, the Court cannot provide any other relief to Appellant – his conviction must be set aside.

WHEREFORE, Appellant requests that the Court deny the Government Motion to Reconsider.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel

Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 17 May 2023.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40247**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas G. LARA	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 10 May 2023, the Government moved this court to reconsider its decision in *United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 160 (A.F. Ct. Crim. App. 10 Apr. 2023) (unpub. op.).* On 17 May 2023, the Appellant opposed the motion for reconsideration.

The panel consisting of Chief Judge Johnson, Judge Ramírez, and Judge Gruen voted 3–0 in favor of reconsideration.

Accordingly, it is by the court on this 22d day of May, 2023,

ORDERED:

The Government's Motion for Reconsideration, dated 7 May 2023, is **GRANTED**. No supplemental briefs will be filed unless ordered by the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

* The Government's motion is dated 7 May 2023, but was timely filed with the court via email on 10 May 2023.