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3706448 (Army Ct.Crim.App.)

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and, as such, does not serve as precedent.
U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellant
v.
Private E2 Gabriel L. DELAGARZA,
United States Army, Appellee.

ARMY **20080891**.

23 Aug. 2010.

Headquarters, United States Army Central Command, Gregg
A. Marchessault, Military Judge, Colonel Thomas Cook,
Staff Judge Advocate.

For Appellant: Colonel Mark Tellitocci, JA; Lieutenant
Colonel Matthew M. Miller, JA; Captain Shay Stanford, JA;
Captain Michael E. Korte, JA (on reply brief) Colonel Mark
Tellitocci, JA; Lieutenant Colonel Matthew M. Miller, JA;
Major Bradley M. Voorhees, JA; Captain Michael E. Korte,
JA (on brief).

For Appellee: Colonel [Norman F.J. Allen III](#), JA; Lieutenant
Colonel Martha C. Foss, JA; Major Lisa L. Gumbs, JA;
Captain [Mark E. Goodson](#), JA (on brief).

Before [CONN](#), [HOFFMAN](#) and [GIFFORD](#), Appellate
Military Judges.

MEMORANDUM OPINION

[HOFFMAN](#), Judge.

*1 A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of violating a general order, false official statement, and two specifications of larceny (from his fellow soldiers), in violation of [Articles 92, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 921](#) [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for eighteen months, and reduction to the grade of E-1. The military judge further recommended that only twelve months of confinement be approved, if appellant made full restitution. The convening authority, as an act of clemency, limited confinement to fifteen months, and otherwise approved the adjudged sentence.

In his brief, appellant raises one assignment of error, post-trial ineffective assistance of counsel, which warrants discussion, but no relief.

FACTS

On 24 December 2008, appellant's defense counsel submitted a two-page memorandum to the convening authority as a request for clemency pursuant to Rule for Court-Martial [hereinafter R.C.M.] 1105/1106 along with four enclosures to the memorandum. The memorandum requested the convening authority grant clemency by disapproving appellant's bad-conduct discharge and confinement in excess of six months. The memorandum noted appellant had to overcome a difficult and abusive upbringing, he was a war veteran and had been struck by two IEDs, he had a daughter, he was remorseful and had made restitution for his larceny offenses, and that the military judge had recommended the convening authority grant clemency by reducing appellant's confinement to twelve months if he made restitution. The enclosures which accompanied the memorandum included a thirty-two page "good soldier book" containing a brief autobiography, awards, schooling, certificates, achievements, and letters of support. An e-mail from the mother of appellant's child was also enclosed. Finally, the enclosures included a letter of apology to Private First Class (PFC) JG promising restitution and an accompanying money order, and an e-mail discussing appellant's having paid restitution to PFC JG.

Despite the voluminous R.C.M. 1105/1106 submission, appellant claims he was never advised by his defense counsel regarding his opportunity to submit clemency matters. Appellant avers, specifically, "My attorney never contacted me about my clemency matters nor was I advised that I was able to provide my own clemency letter." Appellant submits, had he been contacted, he would have requested the convening authority limit confinement to twelve months, as recommended by the military judge, rather than six months, as his counsel requested, and would not have asked that the bad-conduct discharge or reduction in rank be disapproved or for any other relief. Appellant asserts that counsel's bold request caused him to lose credibility with the convening authority.

LAW

"[T]he military accused has the right to the effective assistance of counsel during the pretrial, trial, and post-trial stages" of his court-martial. [United States v. Hicks](#), 47 M.J. 90, 92 (C.A.A.F.1997) (citing [United States v. Carter](#), 40

M.J. 102, 105 (C.M.A.1994); *United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A.1994)). “Counsel is presumed competent until proven otherwise.” *United States v. Gibson*, 46 M.J. 77, 78 (C.A.A.F.1997) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *United States v. Jefferson*, 13 M.J. 1 (C.M.A.1982)).

*2 In order to determine if counsel was ineffective, the Supreme Court adopted a two-prong test in *Strickland*:

First, the [appellant] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the [appellant] by the Sixth Amendment. Second, the [appellant] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable.

Id. at 687. If we conclude that appellant fails to satisfy one prong of the *Strickland* test, we do not need to analyze appellant's showing on the remaining prong. *Id.* at 697; *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F.2001).

When errors occur in the post-trial stage of a court-martial, the threshold for showing resulting prejudice is low “because of the highly discretionary nature of the convening authority's clemency power.” *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F.1999). Where such errors occur, “material prejudice to the substantial rights of an appellant [is shown] if there is an error and the appellant ‘makes some colorable showing of possible prejudice.’ “ *Id.* (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F.1998); *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F.1997)).

DISCUSSION

Appellant was informed of his right to submit clemency matters and the timing for submission of those matters. Appellant's signed post-trial appellate rights form notes that, “I have the right to submit any matters I wish the convening authority to consider in deciding what action to take in my case.” The form also notes that the clemency matters must be submitted within ten days of receiving the staff judge advocate's recommendation (SJAR). When the form was

entered into evidence, the military judge specifically asked appellant whether trial defense counsel had explained his post-trial and appellate rights to him. Appellant affirmed that counsel had discussed these rights with him and that he did not have any questions about those rights.

The SJAR was sent via certified mail to appellant at the Naval Brig Miramar and it was signed for on 4 December 2008. Appellant does not aver in his affidavit that he did not receive the SJAR. Nor does he suggest that he attempted to contact his counsel regarding his clemency submission or submit clemency matters on his own. Perhaps most importantly, appellant does not suggest, and the record does not support, that the convening authority was ignorant of the military judge's recommendation. Indeed, the recommendation was noted in the SJAR and in trial defense counsel's clemency memorandum.

We are satisfied that had appellant amended his R.C.M. 1105 submission as he states he would have, there is no reasonable probability of a more favorable action by the convening authority. As we have stated previously, “[e]ven though clemency is a highly discretionary act, it is unreasonable to believe that the convening authority would have been moved” by appellant's lessened request for clemency to grant more than the three months clemency that he granted in this case. *United States v. Clemente*, 51 M.J. 547, 552 (Army Ct.Crim.App.1999). We are confident a plea to the convening authority for a lesser act of clemency, under these facts, would have been unsuccessful. *See id.*

*3 Taking appellant's affidavit at face value and considering the allegations of prejudice contained therein, we hold appellant has failed to demonstrate prejudice. We “need not decide if defense counsel was deficient ... because the second *Strickland* prong is not met.” *Lee*, 52 M.J. at 53. Appellant has failed to show counsel's performance prejudiced the defense even under the lower post-trial *Wheelus* standard.

CONCLUSION

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

Senior Judge CONN concurs.

GIFFORD, Judge, dissenting:

*3 Based on the evidence currently in the record of trial, I disagree with the majority's decision to decide this case on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Before deciding this case I would order an affidavit from appellant's trial defense counsel. I believe the record of trial contains sufficient evidence which, if un-rebutted, would overcome the presumption of competence. Therefore, an affidavit from appellant's trial defense counsel is necessary to fully and fairly resolve appellant's claim. See generally *United States v. Lewis*, 42 M.J. 1, 5–6 (C.A.A.F.1995). See also *Strickland* 466 U.S. 668; *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F.1998).

Appellant has alleged in a sworn affidavit that his trial defense counsel did not contact him during post-trial proceedings, consult with him regarding the proposed clemency request to the convening authority, or obtain his consent to make a clemency request that appellant avers was inconsistent with his desires (*i.e.*, pursued a different post-trial strategy). Appellant states that the clemency request he would have made, if given the opportunity, would have been consistent with the clemency recommendation of the military judge and was, *inter alia*, more reasonable than what was requested by his trial defense counsel. The evidence currently in the record of trial would appear to support the lack of post-trial contact between appellant and his trial defense counsel and the attendant lack of meaningful opportunity to consult regarding clemency submissions.

Because the majority has determined that appellant has not established prejudice under the standards of *Strickland* and *Wheelus*, it does not address the trial defense counsel's conduct under the first prong of *Strickland*. Some brief comments on the majority's opinion are provided.

COMMENTS ON BACKGROUND

R.C.M. 1105 Matters: The majority notes that appellant's defense counsel submitted “voluminous” clemency matters to the convening authority, pursuant to *R.C.M. 1105*. The majority further observes that the defense counsel's memorandum included four enclosures. The majority generally describes them as a letter from the mother of appellant's son, a thirty-two page “good soldier book,” a letter of apology from appellant to PFC JG and accompanying money order receipt, and an e-mail from the defense counsel addressing appellant's restitution. With the exception of the

e-mail (which reflects communications between the trial defense counsel and government representatives regarding appellant's restitution to PFC JG), all of the enclosures to the *R.C.M. 1105* submission were merely duplicates of documents submitted by the defense counsel during the pre-sentencing phase of appellant's trial. As a result, a majority of the *R.C.M. 1105* matters are duplicative of what was submitted at trial, and do not reflect any personal submissions by appellant, do not reflect any post-trial coordination with appellant, and—based on the sworn affidavit of appellant—do not appear to reflect the personal desires of the appellant regarding clemency vis-a-vis the adjudged sentence.

*4 *Post-trial & Appellate Rights Advisement:* In explaining why appellant has not established prejudice, the majority makes several observations regarding appellant's post-trial and appellate rights. In general, the majority notes appellant was advised by his trial defense counsel in writing of his right to submit clemency matters to the convening authority. Further, the majority notes that during trial appellant expressly acknowledged to the military judge that he read and understood his post-trial and appellate rights.

In examining the written post-trial and appellate rights form completed by appellant, it is noteworthy that the form states appellant must submit clemency matters within ten days after he *and* his counsel received the staff judge advocate's post-trial recommendation. More importantly, however, is the provision on the form which stated: “[C]lemency matters supporting reduction or disapproval of my punishments that I wish the convening authority to consider, and matters in response to the Staff Judge Advocate's recommendation *must be submitted through my attorney* to the convening authority” (emphasis added). This evidence patently reflects appellant's submission of clemency matters was intertwined to appellant's relationship and post-trial contact with his attorney.

The fact that the post-trial and appellate rights form required appellant to submit clemency matters through his counsel is noteworthy. The majority notes the SJAR was sent to appellant at the Miramar Consolidated Naval Brig and signed for on 4 December 2008. The majority further states appellant “does not aver in his affidavit that he did not receive the SJAR ... [n]or does he suggest that he attempted to contact his counsel regarding his clemency submission or submit clemency matters on his own.” The record of trial does not reflect any post-trial contact from appellant's trial defense counsel to appellant. As a result, presuming appellant

received the SJAR, such receipt would appear to be in isolation from contact with his attorney. In this case, the majority's inference that appellant received the SJAR does little to advance their point that he has failed to establish prejudice.

MAJORITY RELIANCE ON *STRICKLAND* PREJUDICE PRONG & SUPPORTING RATIONALE

In determining that appellant has not established prejudice the majority focuses, *inter alia*, on: appellant's knowledge of the opportunity to submit clemency matters and ostensible opportunities to submit such matters; the trial defense counsel's and SJAR's notice to the convening authority of the military judge's clemency recommendation; and the contents of the actual clemency matters submitted to the convening authority. The majority then notes "there is no reasonable probability of a more favorable action by the convening authority." The certainty of such a conclusion is troubling in a case involving the highly discretionary area of convening authority post-trial clemency when, as here, the evidence currently in the record of trial supports that appellant would have pursued a different post-trial strategy, was not afforded a meaningful opportunity to do so, and reasonable minds can differ whether the differing strategy might have made a difference in the convening authority's decision. *Cf. United States v. Clemente*, 51 M.J. 547, 552 (Army Ct.Crim.App.1999).

*5 In a sworn affidavit, appellant states that if he had been provided the opportunity to submit clemency matters he would have put forward a clemency request different from that submitted by his trial defense counsel. Appellant states, *inter alia*, he would have made a more reasonable request regarding disapproval of confinement (approval only twelve months, whereas trial defense counsel asked for approval of only six months) and that he would not have made any request regarding the adjudged bad-conduct discharge (trial defense counsel requested disapproval of the bad-conduct discharge). Appellant notes, and the record of trial supports, that the clemency request he states he would have made is consistent with the clemency recommendation the military judge made. Appellant avers, *inter alia*, that the trial defense counsel's clemency request to the convening authority undermined the credibility of the clemency request he would have made by, *inter alia*, asking for relief that was greater than what the military judge recommended.

Clearly the evidence reflects that in his post-trial and appellate rights form, appellant was advised of the opportunity to submit clemency matters. To this end, in stating that he was not so advised, he is incorrect. The opportunity to submit such matters, however, was expressly tied to his relationship to his attorney. The form clearly states he must submit his clemency matters through his attorney. The majority opinion infers appellant received the SJAR and states appellant "does not aver in his affidavit that he did not receive the SJAR ... nor does he suggest that he attempted to contact his counsel regarding his clemency submission or submit clemency matters on his own." Based on the current evidence in the case, the majority's inference that appellant had an opportunity to submit clemency matters that were meaningful ignores both evidentiary realities and institutional realities.

It should be well recognized that in the military justice system, with limited exception, an accused relies on his attorney when dealing with the convening authority and government representatives who represent the convening authority. Thus, in this case, the majority's reliance on appellant's lack of assertion that he did not independently pursue clemency action to the convening authority ignores the institutional realities of that system.

In addition, the majority's reliance on appellant's purported opportunity to submit clemency matters, in finding no prejudice, ignores the evidentiary realities in this case. The plain language of the post-trial and appellate rights form used in appellant's case—as contained in the record of trial—clearly ties submission of appellant's clemency submission to contact with his attorney. If an appellant does not have contact with his attorney, his opportunity to submit matters "through" him is challenged at best, defeated at worst. Where, when, and how an appellant's actions factor into a post-trial claim of ineffective assistance of counsel claim is case specific. This opinion is not the vehicle for discussing the shared responsibilities of an accused and attorney in post-trial matters. *See e.g., United States v. Palenius*, 2 M.J. 86 (C.M.A.1977) (discussing post-trial responsibilities of defense counsel). Of note, however, is that in discussing its determination of no prejudice, the majority opinion identifies ostensible opportunities by appellant to submit clemency matters and fails to acknowledge evidentiary realities in this case.

*6 In sum, appellant's assertion of error is less than compelling and the determination of whether appellant may have been granted clemency by the convening authority

had he been afforded the opportunity to make his tempered clemency request is uncertain. Simply stated, however, the reasonableness of a clemency request sometimes matters. The evidence in the record reflects and, *inter alia*, appellant avers he would have pursued a different post-trial strategy by asking the convening authority for clemency that requested approval of only twelve months confinement and would not have asked for relief from the bad-conduct discharge. Appellant notes the relief he would have sought conformed to what the military judge recommended. The sentence relief actually sought by his trial defense counsel was, in effect, a greater clemency request than what appellant stated he would have sought and exceeded the clemency request of the military judge. Appellant avers that this undermined the credibility of his clemency request—*i.e.*, lessened the chance that the clemency he sought would be granted.

Reasonable minds may differ as to whether appellant's claim of a differing post-trial strategy might have resulted in clemency relief. In assessing prejudice, however, such uncertainty should be resolved in favor of appellant in light of the low threshold for prejudice in post-trial ineffective

assistance of counsel cases (“some colorable showing of possible prejudice”) and the highly discretionary nature of post-trial clemency. *Wheelus*, 49 M.J. at 289 (citing *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F.1997)); *United States v. Lacy*, 50 M.J. 286 (C.A.A.F.1999); *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A.1988). Further, although the majority highlights the importance of the convening authority being made aware of the military judge's clemency recommendation, in assessing prejudice the convening authority's knowledge of the recommendation should be considered in tandem with the reasonableness of the request for clemency appellant's avers he would have made.

Based on the foregoing and recognizing all the facts of his case—including the efforts of appellant's trial defense counsel in representing him at trial—I disagree with the majority's decision to decide this case on the prejudice prong on *Strickland*. I believe the current evidence, if un-rebutted, is sufficient to overcome the presumption of competence, but believe an affidavit from appellant's trial defense counsel is warranted to fully and fairly analyze appellant's claim.