United States Navy–Marine Corps
Court of Criminal Appeals

Before
DEERWESTER, COGLEY, and KIRKBY
Appellate Military Judges

UNITED STATES
Appellee

v.

Jerion A. FIGUEREO
Private (E-1), U.S. Marine Corps
Appellant

No. 202100048

Decided: 31 March 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Keaton H. Harrell (arraignment)
Nicholas S. Henry (motions)
Kyle G. Phillips (trial)
Benjamin A. Robles (R.C.M. 810(f) hearing)

Sentence adjudged 29 October 2020 by a general court-martial convened at Marine Corps Base Camp Lejeune, North Carolina, consisting of members with enlisted representation. Sentence was adjudged by the military judge based on Appellant's election. Sentence in the Entry of Judgment: confinement for 13 months, forfeiture of all pay and allowances, and a bad-conduct discharge.

4 April 2023: Administrative Correction to reflect additional Appellate Defense Counsel on brief.

For Appellee:
Colonel Joseph M. Jennings, USMC
Lieutenant Gregory A. Rustico, JAGC, USN
Lieutenant Richard B. Royall, JAGC, USN

For Appellant :
Lieutenant Commander Michael W. Wester, JAGC, USN
Lieutenant Aiden J. Stark, JAGC, USN

Judge COGLEY delivered the opinion of the Court, in which Senior Judge DEERWESTER and Judge KIRKBY joined.

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

COGLEY, Judge:

A general court-martial, consisting of members with enlisted representation, convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice [UCMJ].[1] Appellant was acquitted of having committed one specification of abusive sexual contact and one specification of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ.[2]

Consistent with his pleas, Appellant was also found guilty by a military judge alone of one specification of wrongfully consuming alcohol while underage; two specifications of wrongful use of marijuana; two specifications of wrongfully communicating a threat; three specifications of assault consummated by a battery; and one specification of drunk and disorderly conduct in violation of Articles 92, 112a, 115, 128, and 134, UCMJ.[3] Appellant elected military judge alone sentencing.

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[1] 10 U.S.C. § 920.

[2] 10 U.S.C. §§ 920, 928.

[3] 10 U.S.C. §§ 892, 912a, 915, 928, 934.

The military judge sentenced Appellant to a total of 13 months' confinement, total forfeiture of pay and allowances, and a bad-conduct discharge. The confinement portion of the sentence was segmented. Ten months of the confinement sentence was attributed to the specification of abusive sexual contact, Article 120, UCMJ, and was to run consecutively with the rest of the confinement term (three months) attributed to the other charges and their specifications. For the charges and their specifications to which the Appellant pleaded guilty, the military judge imposed between two and three months' confinement all to run concurrently with each other.

Before this Court, Appellant initially asserted seven Assignments of Error (AOEs) and one supplemental AOE, all of which centered upon his conviction for abusive sexual contact, which as noted above, was the sole charge he was convicted of by members: (1) the evidence was legally and factually insufficient; (2) Appellant received ineffective assistance of counsel because his defense counsel labored under a conflict of interest; (3) Appellant received ineffective assistance of counsel when counsel failed to call Lance Corporal (E-3) [LCpl] Romeo[4] to testify at trial; (4) Appellant received ineffective assistance of counsel when counsel failed to confront Private First Class (E-2) [PFC] Evans on inconsistencies between her pretrial statements and trial testimony on the amount of force she said Appellant used; (5) Appellant received ineffective assistance of counsel when counsel waived a lesser included offense instruction of assault consummated by a battery without discussing the issue with Appellant; (6) the cumulative effect of counsel's deficiencies deprived Appellant of the effective assistance of counsel; and (7) the military judge abused his discretion by summarily denying the defense discovery motion regarding the nomination of members.

Upon initial review by this court, and after the review of declarations submitted by Appellant, LCpl Romeo, Maj McClinnis and Capt Brewer, a Rule for Courts-Martial [R.C.M.] 810(f) hearing was ordered on 22 November 2021 to gather additional facts necessary to resolve the assigned errors.[5] The Court did not specify which of the assigned errors the R.C.M. 810(f) hearing was intended to focus on, but the list of questions center on the second and third AOEs. The 22 November 2021 Order directed the military judge assigned to conduct the

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[4] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms. For ease of understanding the background section and procedural history of the case, PFC Evans is a pseudonym for the victim of the abusive sexual contact charge at issue in this opinion. LCpl Romeo is the pseudonym for a defense witness who was not called to testify at the trial. Maj McClinnis was the lead trial defense counsel. Capt Brewer was the assistant trial defense counsel.

[5] *See United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

R.C.M. 810(f) hearing to make detailed findings of fact addressing the following questions:

A. Did Major [(O-4) [Maj]] McClinnis labor under a conflict of interest that [sic], with regard to her decision to not call LCpl Romeo, as a witness?

B. If so, did the conflict of interest adversely affect Maj McClinnis's performance as defense counsel or otherwise undermine the reliability of the trial?

C. Regardless of the existence of a conflict of interest, did Maj McClinnis and Capt[ain] [(O-3) [Capt]] Brewer fail to call LCpl Romeo to testify as a witness without a valid rationale?

This Court also ordered that the military judge's findings of fact specifically address the following questions:

D. Did Maj McClinnis tell LCpl Romeo that PFC Evans "had a bad day in court," and "was really upset at trial," or words to that effect?

E. Did Maj McClinnis tell LCpl Romeo that LCpl Romeo should feel free to contact PFC Evans "to see how she was doing," or words to that effect?

F. Did Maj McClinnis tell LCpl Romeo that if she wanted to do so, LCpl Romeo could "reach out" to PFC Evans, or words to that effect?

G. Did Maj McClinnis tell LCpl Romeo that she was not going to be called as a witness because of the conversation Maj McClinnis had with PFC Evans the day before?

H. Did Maj McClinnis tell LCpl Romeo that Maj McClinnis was concerned that Government lawyers would ask LCpl Romeo questions about Maj McClinnis' conversation with PFC Evans?

I. Did Maj McClinnis tell Appellant "I did not know I wasn't supposed to tell LCpl Romeo not to call PFC Evans," or words to that effect?

J. If so, did Maj McClinnis tell Appellant that the issue of LCpl Romeo contacting PFC Evans was being discussed on the record?

K. Did Maj McClinnis and Appellant have the following exchange, or words to that effect, in response to Appellant's

question about why LCpl Romeo would not be called as a witness:

Maj McClinnis: We're good. We didn't need to call anyone else because LCpl November said everything that needed to be said in court.

[Appellant]: No, we need LCpl Romeo because she's the only female witness we have and this is a female case and that she was the most important witness for our case.

Maj McClinnis: No, we're not gonna call her up there because if we do, they're going to question her about the interaction that happened with PFC Romeo. And they're going to question me about it.

L. Did Maj McClinnis say to Appellant after he insisted she reconsider her decision not to call LCpl Romeo to testify, "This is my decision. As the lawyer, I get to make these types of decisions," or words to that effect?

The R.C.M. 810(f) hearing was held from 22-24 March 2022. The military judge assigned to conduct the R.C.M. 810(f) hearing prepared detailed findings consistent with this Court's order. Subsequently, Appellant submitted a supplemental AOE: did the military judge err by failing to provide the lesser included offense instruction of assault consummated by a battery?

After reviewing the record of the proceedings below, the briefs of counsel, and the military judge's findings from the R.C.M. 810(f) hearing, we find merit in Appellant's second AOE. We find that Appellant's representation was adversely affected by a conflict of interest. However, we find that the conflict of interest arose after his guilty pleas were accepted by the military judge and had no effect on Appellant's representation with regard to the charges to which he pleaded guilty. Accordingly, we find that only his conviction under Specification 2 of Charge IV for abusive sexual contact should be set aside.[6] As a result, we do not reach any of the other AOEs submitted by Appellant pertaining to his conviction under Article 120, UCMJ.[7]

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[6] *See Cuyler v. Sullivan*, 446 U.S. 335, 337 (1980); *United States v. Hale*, 76 M.J. 713, 715 (N-M. Ct. Crim. App. 2017).

[7] As Appellant's second AOE has already resulted in this Court setting aside Specification 2 of Charge IV, any further findings on the other AOEs are rendered moot

We find that the offenses to which Appellant pleaded guilty were unaffected by the conflict of interest and are therefore affirmed. With regard to the sentence, we set aside the segmented portion of Appellant's confinement sentence of ten months attributable to the charge of abusive sexual contact under Specification 2 of Charge IV. We affirm the remaining portions of the sentence given the nature and the number of other offenses on the basis that Appellant would have received both total forfeiture of all pay and allowances and a bad-conduct discharge even without a guilty finding as to Specification 2 of Charge IV.

I. BACKGROUND

This Court did not observe the witnesses and does not purport to evaluate the credibility of PFC Evans' allegation of abusive sexual contact, but in light of the question presented, we observe the following facts in connection with Appellant's second AOE.

Appellant and PFC Evans attended Marine Combat Training [MCT], a month-long training evolution at Marine Corps Base Camp Lejeune. PFC Evans reported, and later testified at trial, that one evening during MCT, Appellant approached her while she was in a laundry room "doing [her] hair"[8] and said: "We used to vibe and now you don't f[---]with me."[9] She testified she "had no clue who he even was."[10] She claimed she told Appellant: "I don't really know you" before going back to "doing [her] hair."[11] PFC Evans stated that moments later, Appellant "reached around and pulled [her] hair"[12] with his right hand and pulled her ponytail down forcefully, causing her chin to rise up. As he did this, she said, he whispered in her ear: "Oh you like that, I know you like that."[13] She said she took two steps away and told him to leave her alone. PFC Evans testified that Appellant then proceeded to walk past her, but as he did, he placed his hand on her hips and rubbed his groin against her groin. She

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"since such findings would have no further practical effect on the outcome of this appeal." *United States v. Dedolph*, No. 202100150, 2022 CCA LEXIS 658, at *35 (N-M. Ct. Crim. App. Nov. 15, 2022).

[8] R. at 434.

[9] R. at 434.

[10] R. at 434.

[11] R. at 434.

[12] R. at 436.

[13] R. at 436.

described it as "like something you'd probably [see] on dirty dancing or something,"[14] and that it was as though his penis brushed across her vaginal area and then she pushed him.[15] PFC Evans later reported this exchange in a statement to the Naval Criminal Investigative Service [NCIS].

These events underpinned the charge of abusive sexual contact under Specification 2 of Charge IV. Appellant entered guilty pleas to a number of unrelated charges, arising from incidents occurring after the incident described above, that consisted of drug use, disorderly conduct, threats, and assaults. Appellant also pleaded not guilty to one other specification of abusive sexual contact under Charge IV and one specification of assault consummated by a battery under Charge V, both arising from separate incidents involving other complaining witnesses. Appellant was acquitted of those charges and specifications. Nevertheless, these two other charges and specifications bore some similarity to Specification 2 of Charge IV in terms of the type of conduct alleged and that the complaining witnesses' allegations were not corroborated by other witnesses or evidence. The assault consummated by a battery under Charge V was alleged to have taken place in the same laundry room where the abusive sexual contact against PFC Evans alleged in Specification 2 of Charge IV allegedly occurred.[16]

Like the two charges and specifications Appellant was acquitted of, PFC Evans' allegation was not corroborated by other witnesses. A defense witness's testimony called into question PFC Evans' statement that she did not know Appellant. Specifically, LCpl November testified that he had seen PFC Evans and Appellant hanging out together in the laundry room, a place where a number of Marines would hang out and talk. As LCpl November described the scene among the Marines hanging out in the laundry room, including Appellant and PFC Evans, "there were males and females in there…like we all knew each other and we were all cool."[17] There was another potential witness who would have corroborated LCpl November's observations and added some additional information that could have impeached PFC Evans as a witness and called into question the credibility of her allegation. That witness was never called.

Before trial, the trial defense team, led by Maj McClinnis, asked the Government to produce LCpl Romeo as a witness for trial, along with a number of

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[14] R. at 439.

[15] R. at 439-440.

[16] R. at 374.

[17] R. at 530-531.

other witnesses. We agree with the finding of the R.C.M. 810(f) judge, which was consistent with what the Defense argued in pretrial motions, that what LCpl Romeo had to offer as a witness was significant.[18] The Defense learned from LCpl Romeo that she was friends with both Appellant and PFC Evans and that she was around Appellant "all the time."[19] Yet she told the Defense she "[n]ever observed anything inappropriate" between Appellant and PFC Evans.[20] Additionally, LCpl Romeo "observed [Appellant]'s interactions with the other females and saw him make them laugh."[21] While not dispositive of the alleged conduct, this would have been valuable impeachment and potentially exculpatory evidence in its own right, but also valuable because LCpl Romeo's and LCpl November's testimony would have been mutually corroborating. LCpl Romeo's testimony would have challenged the credibility of PFC Evans' claim not to know Appellant. Additionally, while LCpl Romeo's claim to have been around Appellant all the time and to never have witnessed anything inappropriate may seem at first blush to be an overstatement, a number of defense witnesses testified that during the one month time period of the training course, they were only allotted a limited number of times when their platoon could use the laundry room and there would generally be quite a few other Marines in the laundry room at the same time, with numbers ranging from five to 30.[22] This testimony could have been enough for members to have a reasonable doubt about the credibility of the abusive sexual contact allegation altogether. Indeed the assault consummated by a battery specification under Charge V alleged similar conduct by Appellant occurring in the same laundry room. One defense witness, PFC Alexis John, testified that he was always in the laundry room at the same time Appellant was and he never saw the complaining witness and Appellant interact with each other in the laundry room.[23] While it is uncertain whether this was the deciding factor for members, Appellant was acquitted of that charge and specification.

During the Article 39(a) hearing on the motion to produce witnesses Maj McClinnis explained to the military judge that the Defense strategy was that

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[18] Record of Trial, Appellate Ex. III at 1-4; *see also* Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 4.

[19] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 3.

[20] *Id*.

[21] *Id.*

[22] R. 505-506; R. at 511; R. at 524; R. at 530

[23] R. at 524-525.

"we are trying to prove a negative" and that, as a result, the Defense intended to call anyone who had the opportunity to observe or not observe something because the more people who testify they did not see anything happen, the more credible that may be.[24] In the course of litigating that motion, the Government agreed to produce LCpl Romeo and two other witnesses. The military judge ordered the production of three other witnesses.[25]

Further, according to information revealed post-trial, LCpl Romeo may have had additional helpful information for the Defense.[26] LCpl Romeo told Maj McClinnis in one of three interviews they had together before trial that a group of Marines regularly hung out together in the laundry room and that PFC Evans was one of them. In addition, LCpl Romeo stated that everyone in this group "acted the same,"[27] that they were "close"[28] and they would flirt, but not in a disrespectful way.[29] LCpl Romeo recalled specifically telling the defense team that Appellant would flirt with another female Marine and make her laugh.[30]

In any case, the Government ultimately produced LCpl Romeo for trial, along with all five of the other witnesses the Government either agreed to produce, or was ordered to produce. All five of the other defense witnesses testified. LCpl Romeo was the only defense witness not called. The decision to rest the defense case without calling LCpl Romeo, even though she was available and prepared to testify, is the foundation of Appellant's second AOE.

At trial, PFC Evans took the witness stand and was cross-examined by the Defense. The cross-examination was contentious, with the trial military judge intervening to tell PFC Evans at one point "I know this is difficult…[but] in order to ensure we have an orderly process here, it's just…there's going to be some questions from defense counsel…[a]nd I need you to answer the questions

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[24] R. at 36.

[25] R. at 55-56.

[26] *See* Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 3-7.

[27] *Id.* at 4.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 5.

from defense counsel..."[31] After PFC Evans' testimony concluded, the Government rested and the military judge instructed the Defense to be prepared to begin its case-in-chief the next day (28 October 2020).[32] In preparation for the next day, Maj McClinnis spoke to LCpl Romeo about PFC Evans. According to findings of fact by the military judge at the R.C.M. 810(f) hearing, during this conversation between Maj McClinnis and LCpl Romeo, Maj McClinnis told LCpl Romeo that PFC Evans had had a "bad day" or a "rough day" in court, that PFC Evans was really upset and that, if she wanted to, LCpl Romeo could call her to check up on PFC Evans. LCpl Romeo understood that Maj McClinnis was doing this out of personal concern and was not directing her to say anything specific to PFC Evans. Nevertheless, LCpl Romeo did contact PFC Evans by both text and phone call that evening. LCpl Romeo indicated to PFC Evans that she was calling because she heard PFC Evans had had a rough day, and that she learned that from Maj McClinnis. PFC Evans affirmed in the call that she was "good" and ended the call.[33]

PFC Evans apparently took the contact by LCpl Romeo as being directed by Maj McClinnis for some unknown improper purpose and reported the contact later that night to her Victims' Legal Counsel [VLC], Capt Sweeney, and her Uniformed Victim Advocate.[34] The next day in court, Capt Sweeney notified the military judge in an 802 conference that he had an issue that he needed to bring to the military judge's attention and the military judge promptly convened an Article 39(a) session.[35]

The R.C.M. 810(f) judge determined that Capt Sweeney also "interpreted the Defense role in instigating [LCpl] Romeo's contact with [PFC] Evans as more directive than it was."[36] Capt Sweeney told the military judge that his client, PFC Evans, reported to him that when LCpl Romeo called her, LCpl Romeo said "How was trial yesterday? Defense wanted to make sure you were OK and if you wanted to talk about what occurred during the trial and your

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[31] R. at 446-470.

[32] R. at 481.

[33] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 8-9.

[34] *Id.* at 9.

[35] *Id*. at 10.

[36] *Id.*

testimony."[37] The military judge then asked Maj McClinnis if she had a response.[38] Maj McClinnis seemed to be flustered at being questioned by the military judge about the call and what her role was in it, making a statement not picked up by microphones, but heard by her co-counsel and Appellant to the effect of "I didn't know I couldn't tell LCpl Romeo she could talk to PFC Evans."[39] According to the R.C.M. 810(f) judge, Maj McClinnis gave "overstated" and "misleading" answers, seeking to minimize her role in the call.[40] Maj McClinnis told the military judge that she "did not in any way instruct LCpl Romeo to contact PFC Evans."[41] Later, in her affidavit to this court, she admitted she told LCpl Romeo it was "not inappropriate to talk to her friend even though they were witnesses at the trial, as long as they did not discuss the trial."[42] Maj McClinnis then later told the military judge she was not sure if the Defense would even call LCpl Romeo as a witness. When the military judge expressed his concern about the Defense trying to reach out to a Government witness, Maj McClinnis disavowed any intent to try to elicit anything from PFC Evans. The military judge then granted the trial counsel's request to cross-examine LCpl Romeo on any contact between her and PFC Evans.[43]

While Maj McClinnis denied any concerns about the possibility that LCpl Romeo might be cross-examined about what Maj McClinnis told her, Maj McClinnis interviewed LCpl Romeo about what she would say regarding their conversation regarding contacting PFC Evans.[44] Subsequently, Maj McClinnis told LCpl Romeo "I don't know if you're going to testify because the conversation between you and PFC Evans might be a conflict because they would…question…why I asked you to call her."[45] Maj McClinnis later told LCpl Romeo she would not be called as a witness because of "the conversation."[46]

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[37] R. at 484.

[38] R. at 484.

[39] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 10.

[40] *Id.* at 10-11.

[41] R. at 484-485.

[42] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 12.

[43] *Id.* at 11.

[44] *Id.*

[45] *Id.* at 12.

[46] *Id.*

Maj McClinnis and her co-counsel explained in post-trial proceedings that there were some risks in calling LCpl Romeo. They believed she had a tendency to say things in a way they considered "outrageous"[47] or exaggerated. There had also been a statement LCpl Romeo made to NCIS in which she said unspecified females told LCpl Romeo she felt uncomfortable around Appellant and in which she said Appellant was "flirty."[48] The risks could have been mitigated and Maj McClinnis had no explanation for not trying to mitigate them. Neither counsel recalled discussing these risks as part of the final decision not to call LCpl Romeo.[49]

There were competing, inconsistent accounts of the decision not to call LCpl Romeo in post-trial proceedings, including whether and to what extent it was discussed among the lead defense counsel, Maj McClinnis, her co-counsel, and Appellant. It was clear that Maj McClinnis and Appellant disagreed about whether it was necessary to call LCpl Romeo.[50] According to the R.C.M. 810(f) judge Maj McClinnis misleadingly wrote in her post-trial affidavit "trial defense counsel discussed with [Appellant] whether to call additional witnesses…[t]his discussion focused on [LCpl Romeo]…after consulting we believed we elicited all of the relevant evidence"[51] The R.C.M. 810(f) judge also concluded that Maj McClinnis "answered evasively" at the R.C.M. 810(f) hearing on the point whether she indicated to Appellant that she had authority to decide who to call as a witness, stating that the premise of the question was negated by the fact that she asked Appellant and assistant trial defense counsel for their input at all.[52] The R.C.M. 810(f) judge concluded that "to the extent this explanation implies LCpl Romeo was not called at the Appellant's request or out of respect for his decision, Maj McClinnis' later testimony refutes this claim."[53] The R.C.M. 810(f) judge went on to note that "[a]t the [R.C.M. 810(f)] hearing, Maj McClinnis conceded that the Appellant demanded that LCpl Ro-

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[47] *Id.* at 7-8.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 14; Record of R.C.M. 810(f) Hr'g at 94-96, Appellate Ex. XXII.

[51] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 14.

[52] *Id.* at 14-15.

[53] *Id.* at 20.

meo be called as a witness. Maj McClinnis also conceded that she and the Appellant disagreed on that point."[54] The R.C.M. 810(f) judge concluded that "[t]hey had a brief discussion, just between the two of them, in which [Appellant] conveyed his position, and Maj McClinnis made the call. Eighteen seconds after the last witness was excused, the defense rested."[55]

Assistant trial defense counsel did not remember any conversation that involved Appellant in the decision whether or not to call LCpl Romeo, only that assistant trial defense counsel asked Maj McClinnis whether there was a need to call LCpl Romeo and that Maj McClinnis responded "no," that they had everything they needed.[56]

The R.C.M. 810(f) judge concluded that there was a separate conversation between Maj McClinnis and Appellant in which Appellant demanded that LCpl Romeo be called as a witness and Maj McClinnis made the call not to.[57] The R.C.M. 810(f) judge concluded that key facts about Appellant's account of the decision and this discussion were borne out by independent corroboration and we agree.[58] While it is a correct view of the law that as lead defense counsel, it was Maj McClinnis' decision to call or not to call a particular witness,[59] the fact that she made the decision not to call LCpl Romeo while laboring under a conflict of interest is significant for the reasons discussed below.

II. DISCUSSION

A. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo.[60] The Sixth Amendment entitles criminal defendants to representation that does not fall

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[54] *Id.* at 20.

[55] *Id.* at 20.

[56] R. at 136-137.

[57] Findings of Fact and Conclusion of Law Pursuant to R.C.M. 810(f) Hr'g at 14.

[58] *Id.* at 15.

[59] Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, JAG Instruction 5803.1E, Rule 1.2

[60] *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

"below an objective standard of reasonableness" in light of "prevailing professional norms."[61] This right to representation necessarily includes the "correlative right to representation that is free from conflicts of interest."[62] Generally, in order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice.[63]

Conflicts of interest do not necessarily require a demonstration of prejudice under *Strickland's* second prong.[64] A key case analyzing conflicts of interest in this context is *Cuyler v. Sullivan.*[65] The Government cites *Mickens v. Taylor*[66] to support an argument that *Cuyler v. Sullivan* should not "unblinkingly" apply beyond the context of cases involving concurrent representation of multiple criminal defendants and, thus, should not apply here.[67] However, we disagree with that application in this case. The key language used by the Supreme Court in *Cuyler* was: "in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[68] When a defendant can show "that a conflict of interest actually affected the adequacy of his representation[, he] need not demonstrate prejudice in order to obtain relief."[69] As we noted in *United States v. Hale*, the key is not whether defense counsel concurrently represented multiple clients, but whether there was an "actual conflict of interest that adversely affected counsel's representation."[70] "We hold that where an appellant demonstrates that his counsel labored under

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[61] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[62] *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

[63] *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010).

[64] *United States v. Saintaude*, 61 M.J. 175, 180 (C.A.A.F. 2005).

[65] *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

[66] 535 U.S. 162 (2002).

[67] Answer on Behalf of Appellee at 28.

[68] *Id.* at 348.

[69] *Id.*; *see also United States v Hale,* 76 M.J. 713, 722 (N-M. Ct. Crim. App. 2017) (holding that an appellant is entitled to presumption of prejudice where his counsel labored under an actual conflict of interest, and where the conflict had an adverse effect on the counsel's performance), *aff'd*, 77 M.J. 138 (C.A.A.F. Dec. 20, 2017) (summary disposition).

[70] *Hale*, 76 M.J. at 718.

an actual conflict of interest, and where the conflict had an adverse effect on the counsel's performance, the appellant is entitled to a presumption of prejudice."[71]

> An actual conflict is a necessary but insufficient prerequisite to benefit from *Cuyler's* limited presumption. A conflict of interest is actual, as opposed to potential, when, during the course of the representation, 'the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action.'[72]

We review a military judge's findings of fact at R.C.M. 810(f) hearings under a clearly erroneous standard and the conclusions of law de novo.[73] Reviewing the findings of fact from the R.C.M. 810(f) hearing under a clearly erroneous standard, we conclude that they are well-supported by the record of trial and the record of the R.C.M. 810(f) hearing and therefore we accept all of these factual findings for purposes of our analysis.

Here, we also agree with the legal conclusions of the military judge at the R.C.M. 810(f) hearing that there was an actual conflict of interest and that it did affect counsel's performance.[74] As stated in *Hale*, an adverse effect on counsel's performance requires an "actual lapse in representation."[75] As we noted in *Hale*, "[t]o prove a lapse in representation, an appellant must show that some plausible alternative defense strategy or tactic might have been pursued, but was not, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."[76]

It was clear in this case that a conflict between the interests of Appellant and Maj McClinnis, arose on the morning of 28 October 2020, just at the point when the Defense was preparing to present its case-in-chief. The record is clear that Maj McClinnis suggested that LCpl Romeo call PFC Evans the evening after PFC Evans' testimony. Regardless of her intent in doing so, she set up a situation where she was flustered in court when she was questioned about it.

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[71] *Id.* at 722.

[72] *Id.* (quoting *United States v. Perez*, 325 F.2d 115, 125 (2d Cir. 2003))

[73] *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

[74] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 16-21.

[75] *Cuyler*, 446 U.S. at 349.

[76] *Hale*, 76 M.J. at 722-723 (citations and internal quotation marks omitted).

She was then presented with a conflict between protecting her own professional reputation and zealously representing her client. Making things worse for the Defense, the military judge stated that he would give the trial counsel latitude in cross-examining LCpl Romeo on her conversation with PFC Evans, which presented a risk that LCpl Romeo would testify in a way that contradicted Maj McClinnis' attempts to minimize her role in this conversation occurring. As noted by the R.C.M. 810(f) judge , this presented an actual conflict of interest. It was not a potential conflict, but a situation where the interests of Appellant were inconsistent with the interests of his defense counsel. While her concern about her professional reputation may have been misguided and there were courses of action she could have taken in this situation that could have both preserved her professional reputation and allowed her to zealously represent her client, the choice she ultimately made reflects that she saw this situation as a binary choice.

In terms of an actual lapse in representation, Appellant has demonstrated that his lead defense counsel could and should have called LCpl Romeo as a witness because she had relevant and unique testimony that could have been beneficial to his defense theory that PFC Evans' allegation should be discredited or at least subject to a reasonable doubt for a number of reasons. These include that it corroborated another witness' testimony that Appellant and PFC Evans knew each other and that he had seen them together, and that since the conduct alleged by PFC Evans was uncorroborated and was not observed by a person who claimed to be around Appellant all the time, it was possible PFC Evans fabricated or exaggerated her complaint. While not dispositive, this testimony would clearly have been helpful to Appellant's defense, especially in light of his acquittal on two other charges and specifications supported by uncorroborated allegations, one of which allegedly occurred in the same laundry room.

The record is clear that LCpl Romeo was present at the trial and prepared to testify. The R.C.M. 810(f) judge found, and after reviewing the record we agree, that neither Maj McClinnis nor assistant trial defense counsel were able to produce a valid rationale for not calling LCpl Romeo.[77] Although they both noted some theoretical risks in calling LCpl Romeo, when questioned in post-trial affidavits, and in their testimony at the R.C.M. 810(f) hearing, they admitted they did not take any precautions to mitigate those risks, and in their own testimony during the R.C.M. 810(f) hearing, neither one cited those risks as the reason the decision was made not to call LCpl Romeo at the time. LCpl Romeo's understanding of the reason she was not called was because of her

[77] Findings of Fact and Conclusions of Law Pursuant to R.C.M. 810(f) Hr'g at 21.

conversation with PFC Evans. When Appellant demanded that his defense counsel call LCpl Romeo as a witness, these risks were also not explained to him. Further, there was virtually no pause between the end of the final witness' testimony and defense counsel resting their case.

As noted by the military judge at the R.C.M. 810(f) hearing, there is no plausible explanation for not calling LCpl Romeo aside from the lead defense counsel's prioritization of protecting her own professional reputation by mitigating the risk that LCpl Romeo would be cross-examined on their conversation about contacting PFC Evans. As a result, the Defense did not call LCpl Romeo and what was probably Appellant's best opportunity to be acquitted of Specification 2 of Charge IV, was missed. At a minimum, this outcome qualifies as an "actual lapse in representation" that resulted from the conflict of interest, thus qualifying Appellant for a presumption of prejudice under *Cuyler*.

Because the conflict of interest arose at the point when it did, on 28 October 2020, after Appellant entered guilty pleas to the other charges and specifications he was sentenced for, we find that Appellant's representation was adequate and that there was no error with respect to those charges and specifications.

III. CONCLUSION

After careful consideration of the record, the briefs of appellate counsel, and the findings of fact and conclusion of law by the military judge at the R.C.M. 810(f) hearing, for the reasons given above, we have determined that the findings as to Specification 2 of Charge IV should be set aside. We find that the remaining findings are correct in law and fact and that, with respect to the remaining findings, no error materially prejudicial to Appellant's substantial rights occurred. We reassess the sentence to set aside the segmented 10-month confinement sentence imposed by the military judge under R.C.M. 1002 attributed to Specification 2 of Charge IV. Pursuant to *United States v. Winckelman*,[78] we reassess and affirm the remaining sentence of 3 months confinement, total forfeiture of all pay and allowances and a bad conduct discharge because we believe that sentence reflects an appropriate sentence given the nature and number of other charges and specifications Appellant was convicted of.[79]

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[78] *United States v. Winckelman*, 73 M.J. 11 (C.A.A.F. 2013).

[79] Articles 59 & 66, UCMJ.

The findings as to Specification 2 of Charge IV are **SET ASIDE.** The remaining findings are **AFFIRMED**. The sentence as reassessed above is **AFFIRMED**. A rehearing on findings and sentence as to Specification 2 of Charge IV is **AUTHORIZED**.

Senior Judge DEERWESTER and Judge KIRKBY concur.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court