IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	*AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT
STANLEY E. EDMOND, Staff Sergeant (SSG) United States Army, Appellant	)	Crim.App. Dkt. No. 9900904
	)	USCA Dkt. No. 03-0086/AR

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Statement of Facts

Amicus curiae adopts the statement of facts as set out in Appellant's Final Brief, pages 4-18.

Summary of Argument

CPT Bovarnick, trial counsel, in conjunction with CPT Beyea, a Special Assistant United States Attorney (SAUSA), improperly interfered with the judicial process when they aggressively warned the sole defense witness, Mr. McQueen, that his proposed testimony amounted to perjury and urged him to invoke his Fifth Amendment right against self-incrimination. These errors were compounded when CPT Libby, the detailed defense counsel, failed to investigate the circumstances under which Mr. McQueen invoked those rights. CPT Libby's inaction was unreasonable in light of professional standards. Mr. McQueen's resulting failure to testify resulted in prejudice against appellant.

Argument

I.

THE ARMY COURT ERRED WHEN IT CONCLUDED THAT THERE WAS NO EVIDENCE OF PROSECUTORIAL INTERFERENCE IN APPELLANT'S CASE, AND AS A RESULT, APPELLANT WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS.

Prosecutorial misconduct is defined as an "action or inaction by a prosecutor in violation of some legal norm or standard, e.g. a constitutional provision, a statute, a Manual

rule, or an applicable professional ethics cannon."[1] "An appellate court usually considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)."[2]

The law forbids "pressuring a witness by threats of prosecution, contempt, *or some other penalty* to give particular testimony (emphasis added)."[3] "Several legal norms are violated when a trial counsel attempt to or unlawfully dissuades a defense witness from testifying at a court-martial."[4] A witness "must be free to testify without fear of governmental retaliation."[5]

Prosecutorial misconduct may exist even when a trial counsel merely warns a witness he could be prosecuted for perjury during a trial.[6] A trial counsel's conduct is unlawful if it "effectively drove the witness off the stand," or "dissuaded the witness from testifying."[7]

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[1] *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) citing *Berger v. United States*, 295 U.S. 78, 88 (1935).
[2] *Meek*, 44 M.J. at 5.
[3] *United States v. Davis*, 22 M.J. 651, 655 (A.C.M.R. 1986).
[4] *Meek*, 44 M.J. at 5.
[5] *United States v. Blackwell*, 694 F.2d 1325, 1334 (D.C. Cir. 1982).
[6] *Blackwell*, 694 F.2d 1325, 1334 citing *Webb v. Texas*, 409 U.S. 95 (1972).
[7] *Webb v. Texas*, 409 U.S. 95, 98.

It is undisputed that CPT Bovarnick (who now holds the rank of Major), the trial counsel, and CPT Beyea, a SAUSA, met with Mr. McQueen, a subpoenaed defense witness, for fifteen minutes on the day of trial. As a result of this meeting, Mr. McQueen, who had originally planned to testify, decided not to testify and departed the courthouse. It is unclear exactly what took place during the prosecution's interview.

The *DuBay* judge concluded there was no evidence of prosecutorial misconduct, finding that Mr. McQueen was neither threatened nor intimidated, and "the only item of discussion was to inform McQueen that that he would be prosecuted as a civilian if he perjured himself."[8]

Although an officer of the court has a duty to not suborn perjury, perjury is not committed simply because two witnesses view the same situation differently. Indeed, "truthful testimony is that which conforms to the facts which the witness believes are true, not truth in the absolute or objective sense."[9] In the instant case, after hearing Mr. McQueen's proposed testimony, CPT Bovarnick told Mr. McQueen "I know it's a lie,"[10] and then brought in the SAUSA to explain the consequences of that presumed lie. CPT Bovarnick's erroneous construction of law dissuaded Mr. McQueen from testifying and

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[8] Brief on Behalf of Appellant (*DuBay* Hearing), at Appendix G.
[9] *United States v. Davis*, 22 M.J. at 656, FN 10.
[10] Appellant's Final Brief, at 12 citing to *DuBay* record at 6566.

should be construed as prosecutorial misconduct.

The Army's Trial Procedure Pamphlet states, "Counsel should not affirmatively urge the witness to exercise his or her right to remain silent in an effort to suppress evidence." [11] Mr. McQueen did not arrive at the courthouse intending to invoke his Fifth Amendment rights, instead stating that he "planned on telling the truth."[12] Yet in the span of fifteen minutes, CPT Bovarnick and CPT Beyea advised Mr. McQueen of at least six separate points of law regarding perjury and the associated penalties, emphasizing that "the government would seek justice" if he committed perjury. [13]

It is unlikely that CPT Bovarnick spent much time ascertaining McQueen's proposed testimony, since he also informed Mr. McQueen about potential perjury charges, found CPT Beyea, informed her of the situation, and brought her into the interview so she could reiterate CPT Bovarnick's concerns. This chain of events seems a very effective way to induce a reluctant

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[11] DA PAM 27-173 *Trial Procedure*, paragraph 38-11 at 392 (31 December 1992).
[12] Appellant's Final Brief, at 9.
[13] In her affidavit, CPT Beyea stated she and CPT Bovarnick informed Mr. McQueen of the consequences of perjury, the federal court's jurisdiction regarding conduct arising from a military tribunal, the likelihood of prosecution, and potential sentencing. She stated that she ensured he was properly informed before he testified, and that it was his decision whether to testify. CPT Bovarnick's affidavit is expressly unclear about his advice to Mr. McQueen. Appellant's Final Brief, at Appendices B and C.

witness to refuse to testify by encouraging him to invoke his Fifth Amendment rights.

Witness testimony is required to be presented under oath or affirmation to "to awaken the witness's conscience and impress the witness's mind with the duty to [testify truthfully]."[14] Trial counsel met with the witness alone and determined his credibility.[15] CPT Bovarnick did not allow the witness to take an oath, instead determining during a one-on-one interview that the witness would commit perjury.

"A military judge is the only person who has the authority to release a subpoenaed witness once that witness has petitioned for relief." [16] CPT Bovarnick further violated the spirit of this rule when he did not consult with a military judge prior to dismissing a lawfully subpoenaed witness who was required to testify.[17] "Issues of whether the witness will claim the privilege [against self-incrimination], and whether its assertion is valid, should be resolved at an out-of-court hearing."[18] If counsel had called for an Article 39(a) session, the issue would have been resolved. "Witnesses...are the

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[14] M.R.E. 603.
[15] Appellant's Final Brief, at 18 citing R. at 27.
[16] R.C.M. 703 (e)(2)(F).
[17] R.C.M. 703 (e)(2)(G)(i), Discussion (failing to comply with a subpoena is a felony offense).
[18] *DA Pamphlet* 27-173, 38-11(b)(2).

property of neither the prosecution nor the defense."[19] As the *DuBay* judge properly noted, "the ideal way to release Mr. McQueen was to get the military judge involved."[20] Rather than deferring to the judgment of the court, CPT Bovarnick frustrated the defense's strategy by simply telling him "you're free to go."[21]

This error is compounded in light of the fact that CPT Bovarnick dismissed Mr. McQueen before the judge reviewed the Stipulation of Fact regarding Mr. McQueen's Fifth Amendment invocation. CPT Bovarnick could not know whether the military judge would accept the Stipulation. Allowing the prosecution to unilaterally release a defense witness is not within the spirit of the rules. Had the stipulation been found unacceptable, another subpoena would have been required.

Although the Supreme Court acknowledges that "the line separating acceptable from improper advocacy is not easily drawn," prosecutors have a duty to "refrain from overzealous conduct."[22] Defense counsel's affidavit describes CPT Bovarnick as a "zealous advocate for the government" with whom he had an "adversarial relationship."[23] Based on the great pains CPT Bovarnick took to emphasize the potential for perjury to Mr.

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[19] *United States v. Irwin*, 30 M.J. 87, 94 (1990).
[20] Brief on Behalf of Appellant (*DuBay* Hearing), at Appendix G.
[21] Appellant's Final Brief, at 7.
[22] *United States v. Young*, 470 U.S. 1, 7 (1984).
[23] Appellant's Final Brief, at Appendix C.

McQueen, one could reasonably conclude that CPT Bovarnick viewed Mr. McQueen's potential exculpatory testimony through the narrow prism of his interpretation of perjury rather than the wider need for the sole defense witness to testify.

While a prosecutor may prosecute with "earnest and vigor," he must use "every legitimate means to bring about a just [conviction]."[24] CPT Bovarnick refers to himself as an "experienced prosecutor" who would "not have hesitated" to inform a witness of the potential outcome of false testimony.[25] If CPT Bovarnick truly believed the witness was going to commit perjury, he should have immediately called for an Article 39(a) session to properly record the witness's invocation of his right to remain silent. This would have given the defense the option to either request clarification on Mr. McQueen's potential perjurious testimony or request that Mr. McQueen be granted immunity during the trial.[26]

An appellate court usually considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (i.e. resulted in prejudice).[27] If the record establishes that the

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[24] *Berger v United States*, 295 U.S. 78, 88 (1935).
[25] Appellant's Final Brief, at Appendix D.
[26] *Satingar v. United States*, 406 U.S. 441 (1972) (Where witnesses have been pressured by the threat of prosecution, a grant of immunity may be offered).
[27] *Meek*, 44 M.J. at 5.

violation of a client's Constitutional rights "was harmless under all the facts of a particular case" then dismissal of charges is not required.[28] Mr. McQueen was the only defense witness, and the only one who could provide appellant's defense to conspiracy. Mr. McQueen's failure to testify was therefore not harmless error.

Moreover, this court has noted an exception to the aforementioned rule when necessary to "preserve the fundamental integrity of the judicial system."[29] This integrity appears to be violated in this situation - trial counsel aggressively sought to dissuade the sole defense witness from testifying and then compounded this error by dismissing him without the proper judicial review. Inducing a reluctant defense witness to invoke his Fifth Amendment rights undermines the integrity of the judicial system, and as a result appellant suffered a conviction for two additional specifications. But for the prosecution's interference, exculpatory testimony would have been offered and those convictions may never have occurred.

II.

DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE AN EXCULPATORY DEFENSE WITNESS, WHICH RENDERED COUNSEL'S PERFORMANCE SUFFICIENTLY DEFICIENT TO MEET THE TEST ENUNCIATED IN *STRICKLAND V. WASHINGTON*.

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[28] *United States v. Golston*, 53 M.J. 61, 64 (C.A.A.F. 1999).
[29] *United States v. Davis*, 22 M.J. 651, 655.

"The factual findings of the military judge are reviewed under a clearly erroneous standard, and the ultimate determination whether the representation was ineffective, and if so, whether it was prejudicial are reviewed *de novo*.[30]

The Army court below did not consider counsel's failure to investigate but simply inquired whether defense counsel made a valid tactical choice. In most circumstances, the choice to call a witness in furtherance of a defense theory of the case is a valid tactical choice. However, calling or not calling a given witness is tactical only when defense counsel can make an informed legal assessment of the potential witness's testimony.[31]

Under *Strickland v. Washington*, for an ineffective assistance of counsel claim to succeed, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant.[32] Counsel has a duty to make reasonable investigations and a particular decision not to investigate must be assessed for reasonableness with deference given to counsel's judgment.[33]

In this case, CPT Libby failed to interview a defense witness and substituted trial counsel's assessment of the

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[30] *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997) (citations omitted).
[31] *United States v. Alves*, 53 M.J. 286, 290 (C.A.A.F. 2000).
[32] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
[33] *Id.* at 691.

witness's credibility for his own. In so doing, he breached counsel's duty to make a reasonable investigation. This breach of duty was further compounded by CPT Libby's failure to object to trial counsel's release of Mr. McQueen from the subpoena. As a result of these omissions, appellant was prevented from presenting the only witness who could have provided exculpatory evidence on the charges alleging larceny and conspiracy to commit larceny.

Reasonableness is the standard for determining whether counsel's actions amount to ineffective assistance.[34] Here counsel's actions were unreasonable "under prevailing professional norms."[35] It was unreasonable for CPT Libby not to speak with Mr. McQueen while he was in the courthouse under subpoena to testify for the defense. CPT Libby does not remember speaking with Mr. McQueen at all on the day of the trial, admitting his own failure to investigate.[36] However, CPT Libby did recall that McQueen's expected testimony would have been helpful to the defense.[37] However, when CPT Bovarnick approached CPT Libby after already speaking with Mr. McQueen, they agreed to stipulate that Mr. McQueen would invoke the Fifth Amendment. Without more, CPT Libby then deferred to trial

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[34] *Id.* at 688.
[35] *Id.* at 687.
[36] Appellant's *Dubay* Brief, Appendix C, CPT Libby's affidavit at 1.
[37] *Id.*

counsel's judgment and agreed that Mr. McQueen could be dismissed.

CPT Libby did not know what trial counsel or the SAUSA told Mr. McQueen, nor did he know what Mr. McQueen told them, nor did he know what Mr. McQueen planned to say on the stand. Even if CPT Libby anticipated what Mr. McQueen would testify to, this does not excuse the failure to assess Mr. McQueen's expected testimony for himself. CPT Libby could not have made an informed tactical choice concerning Mr. McQueen's testimony, because he had no facts upon which to base a decision. Had CPT Libby spoken with Mr. McQueen about what he planned to say and inquired about the conversation with trial counsel and the SAUSA, he would have been in a position to make a tactical decision whether to call Mr. McQueen. But CPT Libby simply agreed with trial counsel to stipulate that Mr. McQueen would invoke his Fifth Amendment rights.

CPT Libby abdicated his responsibility to his client in his failure to investigate, rendering his performance deficient. To provide minimally competent professional representation, an attorney must investigate a case when he has cause to do so.[38] In this case, where it was trial counsel who spoke with the defense witness and then informed defense counsel that the witness would invoke his Fifth Amendment if called to the stand,

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[38] *Alves*, 53 M.J. at 289.

defense counsel had cause to investigate. Mr. McQueen changed his mind about testifying, and CPT Libby should have inquired into the causes of this change. Inasmuch as CPT Libby had cause to investigate yet failed to so, he failed to provide appellant with "minimally competent professional representation," and therefore his performance was deficient under the standard set forth in the first prong of *Strickland*.[39]

When Mr. McQueen walked out of the courthouse without testifying, SSG Edmond was prejudiced--he was prevented from presenting exculpatory evidence on the conspiracy charge. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of events as well as the prosecutions to the jury so it may decide where the truth lies."[40] "Where testimony of missing witnesses directly contradicted prosecution witness and supported defense's theory of the case, defendant has met his burden of showing prejudice."[41]

The facts of this case are the same. The missing witness, Mr. McQueen, would have contradicted CPT Phillips about whether there was a conspiracy to steal the cell phones. Mr. McQueen's

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[39] *Strickland v. Washington*, 466 U.S. at 668.
[40] *Washington v. Texas*, 388 U.S. 14, 19 (1967).
[41] *United States v. Gray*, 878 F.2d at 714; *see Nealy v. Cabana*, 764 F.2d 1173, 1180 (5th Cir. 1985).

testimony would have supported defense's theory of the case by showing that there was no conspiracy to steal the cell phones.

Counsel's deficient conduct effectively prevented SSG Edmond from presenting his version of events; Mr. McQueen was subpoenaed to testify for the defense and he would have contradicted the testimony by CPT Phillips. However, because CPT Libby allowed Mr. McQueen to leave without question and without testifying, appellant was prejudiced.

"Prejudice occurs when the defendant shows that 'there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[42] In the instant case, but for CPT Libby's failure to investigate into the conversation between him and trial counsel, Mr. McQueen would have offered exculpatory testimony for the defendant, creating a reasonable probability that appellant would not have been convicted on the conspiracy charge.

So far as Mr. McQueen had information that was exculpatory for the defendant as to the conspiracy to commit larceny charge, and he left the courthouse without testifying, defense counsel's failure to investigate the events leading to Mr. McQueen's decision not to testify was not a tactical decision, it was an

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[42] *United States v. Wean*, 45 M.J. at 464, citing *Strickland*, 466 U.S. at 694.

unreasonable failure to investigate. Appellant was prejudiced by this error because but for CPT Libby's inaction, there was a reasonable probability that the result of the proceeding would have been different.

Conclusion

CPT Bovarnick's prosecutorial misconduct and CPT Libby's ineffective assistance of counsel amount to an infringement of appellant's Fifth and Sixth Amendment rights. For these reasons, the conspiracy and larceny charges should be set aside and the case remanded for sentence reassessment.

Respectfully submitted,

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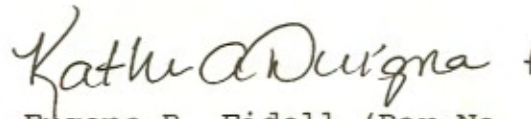

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April 14, 2006

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 2,884 words.

2. This brief complies with the type face and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface, 12-point Courier New, using Microsoft Word 2003.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original and seven copies of the foregoing were personally delivered to the Court and to defense and government appellate counsel on April 14, 2006.

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