**IN THE UNITED STATES NAVY-MARINE CORPS**

 **COURT OF CRIMINAL APPEALS**

|  |  |
| --- | --- |
| UNITED STATES, | BRIEF ON BEHALF OF APPELLANT |
|  Appellee |  |
|  v.  | Docket No. 201400373 |
|  |  |
|  | Tried at Naval Station Norfolk, Virginia on 12 May and 12, 24, and 25 June 2014,by a general court-martial, convened by Commander, Navy Region Mid-Atlantic. |
| **DARIN G. LOPEZ**Intelligence Specialist Second Class (E-5) |
| United States Navy,  |
|  Appellant |

TO THE HONORABLE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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**Issues Presented**

**I.**

**IS THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR SEXUAL ASSAULT DUE TO INTOXICATION WHERE E.H. CONSUMED ONLY THREE DRINKS AND THERE IS NO EVIDENCE E.H. CONSUMED ANY OTHER INTOXICANT?**

**II.**

**WAS APPELLANT DENIED HIS RIGHT UNDER THE 6TH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INVESTIGATE AND PRESENT EVIDENCE THAT E.H. EXPERIENCED MEMORY BLACKOUTS PRIOR TO, DURING, AND AFTER THE ALLEGED SEXUAL ASSAULT?**

**III.**

**IS APPELLANT ENTITLED TO A NEW POST-TRIAL REVIEW AND ACTION BECAUSE DETAILED DEFENSE COUNSEL PROVIDED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, INEFFECTIVE ASSISTANCE OF COUNSEL IN THE POST-TRIAL PHASE WHEN HE FAILED TO CONSULT WITH APPELLANT PRIOR TO SUBMITTING MATTERS AND BECAUSE APPELLANT IS ENTITLED TO CONFLICT FREE COUNSEL?**

**Statement of Statutory Jurisdiction**

Appellant’s approved general court-martial sentence includes a bad-conduct discharge. (General Court-Martial Order [hereinafter GCMO] No. 19-14, 9 October 2014). Accordingly, this Court has jurisdiction under Article 66 (b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866 (2012).

**Statement of the Case**

 A military judge, sitting as a general court-martial convicted Intelligence Specialist Second Class (IS2) Darin G. Lopez [hereinafter appellant] , contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ, 10 USC § 920(2012). R. at 209. The military judge sentenced appellant to be confined for a period of three years and to be discharged with a bad-conduct discharge. R. at 238. The convening authority approved the adjudged sentence. GCMO No. 19-14, 9 October 2014.

**Statement of the Facts**

 In June 2012, Lance Corporal E.H. and appellant met at a taxi stand at a mall in Sierra Vista, Arizona when both were assigned to Fort Huachuca. R. at 123. Appellant gave E.H. a ride from the mall to her barracks on Fort Huachuca. R. at 124. The two exchanged phone numbers. *Id*. E.H. testified that later that day she went to dinner with appellant, but explained, “I don’t remember anything about it.” R. at 125. She had previously told investigators that she had dinner with appellant at Appelbees, but at trial claimed no memory of the details of the dinner or even that she had met appellant at Applebees. R. at 144.

 E.H. testified that after exchanging phone numbers she spoke with appellant “daily.” R. at 125. She also testified that she is “not entirely sure” when she saw appellant again. R. at 126. She further testified that on Saturday, 24 November 2012, she went to the Peacock club “late” in the evening in Sierra Vista to meet friends. R. at 126, 156. When her friends did not show up, she called appellant and invited him to meet her at the Peacock. R. at 126-27.

 E.H. testified that she had a total of three drinks at the Peacock club: “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” R. at 127. She had nothing to drink before going to the Peacock. R. at 156. During that time period, E.H. drank a few mixed drinks once or twice per month without significant side effects. R. at 129. On the night at issue, however, she explained that she felt “dizziness.” *Id*. She described her level of intoxication as “more intense, different almost,” compared with other nights she would drink. *Id*.

 E.H. testified that the last thing she remembers about being at the bar was, “Just standing there.” *Id*. She testified that the next thing she remembers is waking up with appellant on top of her having sex with her. R. at 130-31. She testified that appellant said, “don’t worry, I used a condom.” R. at 130. Appellant’s apartment was a third floor walk-up. R. at 174. E.H. does not remember leaving the bar or going anywhere else. R. at 130. The government introduced no evidence as to how E.H. got from the bar to appellant’s apartment and up three flights of stairs.

 According to E.H. when she woke up that morning her black dress was up around her waist and she was covered in vomit and a sticky clear fluid. R. at 132-34. She “immediately got into the shower” at which point she discovered bite marks on her breasts and scratches on her lower back. R. at 133-34. When E.H. went for a medical appointment the morning of 24 November 2012, she did not show the injuries to anyone. R. at 143. There are no photos or any other record of the alleged injuries. *Id*.

 After getting out of the shower, E.H. testified that she wrote in the mirror, “I’m in hell, help me.” R. at 135. She then sat on a couch wrapped in a towel while she waited for her dress to finish in the dryer. R. at 136-37. She testified that she remembers hearing appellant’s voice in the apartment, but that she could not see him. R. at 137.

 Tamara Ruiz, a taxicab driver, testified for the government. R. at 104. Ms. Ruiz was dispatched to pick up a male at appellant’s address. R. at 105. When she arrived at the address, a male waived at her from the second floor and then E.H. came down and got into her taxicab. R. at 106, 112. E.H. appeared “desperate” and was “crying.” R. at 108, 110. Ms. Ruiz offered to take E.H. to the police, but E.H. declined the offer. R. at 111. Ms. Ruiz testified that she spoke with E.H. for an hour before dropping her off on Fort Huachuca. R. at 107. According to Ms. Ruiz, they stopped at a 7-Eleven where E.H. bought a pack of cigarettes and a soda. R. at 111-12. During cross-examination, E.H. stated that she has no memory of the hour-long conversation with the taxicab driver. R. at 143. E.H. also denied any memory of stopping at the 7-Eleven or buying cigarettes or a soda. R. at 144-45.

 Defense counsel conceded during his opening statement that a sexual act took place. R. at 100. In his Special Findings, the military judge found that appellant, “committed a sexual act upon LCpl E.H. . . .when LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant, a condition that was known or reasonably should have been known to Accused.” R. at App. Ex. XX. The military judge further explained that, “[i]n finding LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant . . . the Court relies upon the credible testimony of LCpl E.H.” *Id*. The military judge points to the statement, “don’t worry, I used a condom,” as “key in establishing . . . E.H. was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication.” *Id*. The military judge does not address the possibility that E.H. suffered a memory blackout.

 Prior to trial, defense counsel received a copy of E.H.’s medication history indicating that she had been prescribed hydrocodone. Appellant’s Affidavit.[[1]](#footnote-1) Counsel and appellant discussed this prescription prior to trial. *Id*. Appellant and defense counsel discussed the possibility that E.H. had been taking hydrocodone prior to 24 November 2012, the date of the alleged assault and that E.H. may have been suffering from a memory blackout at the time that appellant and E.H. had sexual intercourse. *Id*.

**Summary of Arguments**

 The government failed to prove the second element of the charged offense: that the sexual act took place when E.H. was incapable of consenting due to impairment by an intoxicant, and that the condition was known or reasonably should have been known by appellant. E.H. consumed only three drinks, had a full stomach, and was an experienced drinker. Based on the evidence introduced at trial, it is much more likely that E.H. experienced a memory blackout than it is that she was impaired and incapable of consenting. Furthermore, appellant and E.H. drank at the bar together, so appellant was well aware that E.H. consumed only three drinks; appellant could not reasonably have been expected to know E.H. was incapable of consenting.

 Detailed defense counsel was ineffective because he failed to investigate and present evidence that E.H. suffered memory blackouts before, during, and after the alleged sexual assault. The pretrial investigation and E.H.’s pretrial statements make it abundantly clear that E.H. suffered from memory blackouts. Failing to investigate the cause of these blackouts was ineffective. Furthermore, appellant was prejudiced by this lack of investigation because the only contested issue in the case was whether E.H. was experiencing blackouts or was passed out during sex with appellant.

 Finally, appellant is entitled to a new post-trial review and action because detailed counsel failed to consult with appellant prior to submitting matters. Furthermore, detailed counsel had a conflict of interest because appellant told him his performance had been ineffective and attempted to replace him with civilian counsel.

**Assignments of Error**

**I.**

**THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION BECAUSE E.H. CONSUMED ONLY THREE DRINKS AND THERE IS NO EVIDENCE E.H. CONSUMED ANY OTHER INTOXICANT.**

**Standard of Review**

The legal sufficiency of the evidence is a question of law reviewed *de novo*. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013).

**Argument**

The test for legal sufficiency is whether, when viewed in a light most favorable to the government, any rational trier of fact could have found that the evidence met the essential elements of the charged offense. *United States v. Turner*, 25 MJ. 324, 324-25 (C.M.A. 1987). The test for factual sufficiency is whether the court is convinced of the Appellant’s guilt beyond a reasonable doubt, allowing for the fact that they did not personally observe the witnesses. *Id.*; Article 66(c), UCMJ. A factual sufficiency review “includes a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The government was obligated to prove two elements beyond a reasonable doubt: 1) On or about 24 November 2012, at or near Sierra Vista, Arizona, appellant committed a sexual act upon E.H., to wit: penetration of her vulva with his penis; and 2) appellant did so when E.H. was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by appellant. MCM, pt. IV, ¶45(b)(2) (2012). The first element was uncontested at trial. R. at 100. However, the government failed to prove the second element beyond a reasonable doubt.

**A. E.H. Was Not Impaired By An Intoxicant And Was Able To Consent.**

 The only evidence introduced at trial is that E.H. consumed just three alcoholic drinks over the course of the evening: two mixed drinks containing rum and pineapple juice and one shot of Goldschlager. R. at 127. There is no other evidence of an intoxicant. Furthermore, E.H. regularly consumed about that same amount of alcohol without significant intoxication and she had eaten dinner prior to arriving at the Peacock Club. R. at 129, 157. It is very unlikely that E.H. became intoxicated by the three drinks at a level rendering her unable to consent.

The government failed to introduce any other evidence of an intoxicant. However, during E.H.’s testimony the prosecution implied that appellant placed an unknown intoxicant in E.H.’s drink. *See* R. at 128-29. The trial counsel elicited from E.H. that an unknown woman at the Peacock Club asked E.H. if she, “needed to get away.” R. at 128. Despite being inadmissible and irrelevant hearsay, the military judge allowed this testimony over defense objection. *Id*. The trial counsel next elicited from E.H. that at some point while drinking at the bar with appellant, she left to go to the restroom and when she returned she continued to drink. R. at 128. Finally, the military judge allowed the trial counsel to elicit from Tamara Ruiz, the taxicab driver, that E.H. told her during their conversation that E.H., “thought she had been drugged and raped.” R. at 118.

 Despite there being no evidence whatsoever that appellant or anyone else placed a drug in E.H.’s drink, the military judge made special findings that “E.H. remembers going to the restroom on one occasion and then returning to the bar where she continued to drink.” *See* App. Ex. XX, ¶ 3.e. This factual finding is completely irrelevant unless the military judge believes that while E.H. was in the restroom appellant or someone else placed an unknown intoxicant in her drink. The military judge’s special findings are based upon inadmissible and irrelevant speculation.

 This speculative conclusion is contrary to the available evidence. On 26 November 2012 at 1014, E.H. underwent a urine drug screen at a clinic on Fort Huachuca. A little more than twenty-four hours after leaving the Peacock Club E.H.’s urine tested negative for opiates, barbituates, amphetamines, benzodiazapenes, cocaine, phencyclidine, and cannabinoids. This information was available in the CID file as exhibit 17 and is included in the allied documents in the record of trial.[[2]](#footnote-2) Appellant’s defense counsel failed to utilize this information at trial to counter the prosecution’s implication that appellant placed an unknown intoxicant in E.H.’s drink. The military judge then adopted this implication as fact.

**B. E.H.’s Lack Of Memory Is More Likely The Result of A Memory Blackout Or Deception Than The Result Of Passing Out.**

 E.H. suffered from significant gaps in her memory before, during, and after her sexual encounter with appellant. E.H.’s memory is oddly specific on certain topics in contrast with her significant memory gaps on other topics. She recalls the details of meeting appellant at a taxi stand at the mall, but cannot recall any details of having dinner with appellant at Applebees later the same night. R. at 125, 144. E.H. testified that after exchanging numbers at the mall, she spoke with appellant “daily” but is “not entirely sure” when she saw him next. R. at 124-25. In her testimony, E.H. was very specific in describing the three drinks she consumed: “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” R. at 127. On the other hand, she provides no information as to how she traveled from the Peacock Club to appellant’s apartment complex, up three flights of stairs, and into appellant’s small apartment. R. at 129-31, 174.

 E.H.’s lack of memory as to how she got from the bar to appellant’s apartment dictates choosing one of two possibilities: E.H. either experienced a memory blackout or she lied. There is no evidence that appellant carried E.H. out of the Peacock Club and carried her up three flights of stairs at his apartment. It’s much more likely she was experiencing intermittent memory blackouts or she lied.

 In his special findings, the military judge points to another oddly specific part of E.H.’s testimony: E.H.’s claim that she woke up with appellant on top of her and appellant’s statement, “don’t worry, I used a condom.” App. Ex. XX, pp. 4-5. This alleged statement, according to the military judge is “key in establishing . . . pivotal facts . . . she was unconscious due to her state of intoxication.” *Id*. The military judge completely ignores the fact that E.H. consumed only three drinks. He was also, unfortunately, not made aware of the drug screen results.

 E.H. testified that she woke up with appellant on top of her. R. at 130. The military judge’s conclusion that E.H.’s testimony on this point is accurate is unfounded given the evidence is that E.H. consumed only three drinks. R. at 127. E.H.’s lack of memory is more likely due to an unknown underlying condition that caused her to experience memory blackouts than it is due to alcohol intoxication. It is also more likely that she was attempting to mislead the court than it is that she passed out hours after consuming only three drinks.

**C. Because E.H. Only Consumed Three Drinks, Appellant Could Not Know Or Reasonably Be Expected To Know That E.H. Was Impaired By An Intoxicant.**

 E.H. had no alcoholic drinks prior to arriving at the Peacock Club. R. at 156. E.H. called appellant and invited him to the Peacock Club and according to E.H. when he arrived, they were “socializing.” R. at 126-127. Appellant and E.H. ordered their drinks together while standing at the bar. R. at 127. Appellant therefore would have observed E.H. from the time he arrived at the bar when E.H. was completely sober until several hours later when she had consumed only the three alcoholic drinks.

 When E.H. and appellant left the bar together, appellant reasonably would have believed that at most E.H. was feeling only minor effects from the three drinks. E.H. testified that she does not remember leaving the bar. R. at 129-131. Even if E.H. was experiencing a memory blackout as she claims, she would have been moving normally and talking normally and she could consent to sex even while experiencing a blackout. To appellant, E.H. would have appeared awake and far from impaired to the point of being unable to consent to sex. After observing E.H. consume only three drinks and then leaving the bar with her under her own power, appellant had a reasonable belief that she was consenting to the sex act.

 The finding of guilt of The Specification and Charge and the sentence must therefore be set aside. WHEREFORE Appellant so prays.

**II.**

**APPELLANT WAS DENIED HIS RIGHT UNDER THE 6TH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INVESTIGATE AND PRESENT EVIDENCE THAT E.H. EXPERIENCED MEMORY BLACKOUTS PRIOR TO, DURING, AND AFTER THE ALLEGED SEXUAL ASSAULT.**

**Standard of Review**

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012).

**Argument**

The Sixth Amendment to the constitution guarantees not only the right to counsel, but the “right to effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish 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.” *Datavs*, 71 M.J. at 424 (citing *Strickland*).

With respect to the first *Strickland* prong, appellant bears the burden to show that his “counsel’s performance fell below an objective standard of reasonableness – that counsel was not functioning as counsel within the meaning of the Sixth Amendment.” *United States v. Edmond*, 63 M.J. 343, 351 (C.A.A.F. 2006). Thus, the question is whether “the level of advocacy falls measurably below the performance ordinarily expected of fallible lawyers.” *United States v. Haney*, 64 M.J. 101, 106 (C.A.A.F. 2006) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

Penetration was not at issue in this case. R. at 100. Whether E.H. was unconscious at the time of penetration or was experiencing a memory blackout was the contested issue and key to an effective defense. Despite having significant evidence before trial that E.H. experienced a memory blackout, defense counsel did nothing to further develop or present this evidence and thus fell well below the Strickland objective standard of reasonableness.

Prior to trial, defense counsel should have been aware of E.H.’s claim that she could not remember key blocks of time. For example, E.H. testified during the Article 32, pretrial investigation, that she did not remember leaving the Peacock Club or how she arrived at appellant’s apartment. See R. at Allied Documents, Article 32 transcript, p. 1. Defense counsel also had access to the CID file including exhibit 17. A list of E.H.’s prescriptions is included in that report. Defense counsel discussed this list of medications with appellant prior to trial including the fact that E.H. had been prescribed hydrocodone. Appellant’s Affidavit.

Had defense counsel done the least bit of investigating, he would have found that alcohol induced blackouts do occur among young social drinkers even when only relatively small amounts of alcohol are consumed when mixed with certain prescription medications. *See* *e.g.* Aaron M. White, Ph.D., What Happened? Alcohol, Memory Blackouts, and the Brain, Alcohol Research & Health, vol. 27, No. 2, 2003, at 189-190. Defense counsel also apparently failed to investigate whether any of the drugs, including hydrocodone, in E.H.’s medical records could have interacted with the alcohol she consumed to cause memory blackouts. Defense counsel’s performance before and during trial thus fell well below the objective standard of reasonableness required under *Strickland*.

Defense counsel presented an inconsistent and contradictory defense. In his opening statement, defense counsel told the military judge that he intended to call an expert witness to “talk about blackouts.” R. at 100. Inexplicably, however, defense counsel failed to present any evidence on blackouts to the court. However, defense counsel argued in his post-trial clemency request that E.H. experienced blackouts. *See* Matters Submitted By The Accused, (22 Sep 14). “It is entirely possible that LCpl H was in a blackout state in which she was not recording memories but outwardly appeared willing and able to make decisions (i.e. consent to sexual activity). To make the conclusion that a person was unconscious versus blacked out without any supporting evidence is too great of a leap to make in the absence of any expert analysis on LCpl H's symptoms.” *Id*. at p. 4. Defense counsel had an expert consultant available to do precisely what he asserts in the clemency request was necessary for an informed decision by the court. However, he failed to utilize that expert. *See* R. at 100.

 With respect to the second prong of the *Strickland* analysis, that the deficiency resulted in prejudice, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Polk*, 32 M.J. at 153. E.H. provided the only account of what occurred at the Peacock Club and at appellant’s apartment. Her claim that the last thing she remembers about being at the bar was, “Just standing there,” and that the next thing she remembers is waking up with appellant on top of her having sex with her was the key to the government’s case. R. at 129-31.

 The government provided no evidence as to how E.H. went from standing at the bar to appellant’s apartment. Had defense provided the expert testimony that was apparently available to explain how E.H. could have experienced a memory blackout between standing at the bar and having sex with appellant, the outcome of the case would have been different. Had the defense demonstrated how E.H. under those circumstances could have experienced a memory blackout, the government’s case would have fallen apart. Defense counsel’s failure to develop or present evidence that E.H. experienced a blackout prejudiced appellant. Without blackout evidence, appellant is convicted based solely on E.H.’s description of events. With blackout evidence he is acquitted. While military judges are presumed to know and apply the law, they cannot be presumed to know the evidence and to be expert toxicologists.

The finding of guilt of The Specification and Charge and the sentence must therefore be set aside. WHEREFORE Appellant so prays.

**III.**

**APPELLANT IS ENTITLED TO A NEW POST-TRIAL REVIEW AND ACTION BECAUSE DETAILED DEFENSE COUNSEL PROVIDED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, INEFFECTIVE ASSISTANCE OF COUNSEL IN THE POST-TRIAL PHASE WHEN HE FAILED TO CONSULT WITH APPELLANT PRIOR TO SUBMITTING MATTERS AND BECAUSE APPELLANT IS ENTITLED TO CONFLICT FREE COUNSEL.**

**Standard of Review**

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citations omitted).

**Additional Statement of Facts**

 Shortly after trial, appellant informed detailed defense counsel that he wished to sever their attorney client relationship because he believed his performance had been deficient during trial. Appellant’s Affidavit. A few weeks after arriving at the confinement facility, appellant attempted to contact his detailed counsel in order to reiterate his desire to sever the attorney-client relationship. *See* DD Form 510, dated 20140716.[[3]](#footnote-3) In block 3.b. of the DD Form 510, appellant wrote, “Respectfully request to contact Navy Legal JAG LT Hochmuth (sic) and suspend his ability to make any decisions in regard to my case due to the hire of a private civilian attorney which he has known . . . since June 28, 2014.” *Id*.

 On 22 September 2014, without consulting appellant, detailed counsel submitted a six page memorandum to the convening authority with the subject, “MATTERS SUBMITTED BY THE ACCUSED ICO US V. IS2 DARIN G. LOPEZ, USN.” However, appellant was not afforded an opportunity to review this memorandum. *Id*. There is no evidence in the record of trial of any participation by appellant in the preparation of the clemency matters. The memorandum included no enclosures despite appellant’s desire to submit his own letter and letters of support. Appellant’s Affidavit. On 9 October 2014, the convening authority took action approving the sentence having considered, “the clemency letter from defense counsel of 22 September 2014 . . . .” GCMO, Oct 09 2014.

**Argument**

**A. Defense Counsel Was Ineffective When He Failed To Consult With Appellant Prior To Submitting Appellant’s Clemency Request.**

 As stated in the previous assignment of error, to prevail on a claim of ineffective assistance of counsel, the appellant must satisfy a two-prong test: (1) competency and (2) prejudice. *Strickland,* 466 U.S. 668 (1984). The proper inquiry under the first prong is whether counsel's conduct fell below an objective standard of reasonableness, or was it outside the “wide range of professionally competent assistance.” *Strickland,* 466 U.S.694. There must be a “showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”  *Id*. To that end, appellant must show that counsel’s representation fell below an objective standard of reasonableness. *Id*. at 687-88. The prejudice requirement focuses on whether counsel's deficient performance affected the outcome of the process. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

 As for the first prong of the *Strickland* test, a competent defense counsel is required at a minimum to consult with his client prior to submitting clemency matters. As this Court well knows, “[w]e continue to believe that the convening authority remains the accused's best hope for sentence relief.” *See United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999) (internal quotes and citations omitted). Despite this last and best hope, defense counsel failed to collect and submit a single letter requesting sentence relief. Such a failure is plainly “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland,* 466 U.S. at 687.

 Rule for Court-Martial 1105 is entitled: “Matters submitted by the accused.” The purpose of the rule is defeated if the accused is not given at least an opportunity by his defense counsel to make a personal request to the convening authority on his own behalf. The word “accused” is used throughout the rule, suggesting whom the issue of clemency is to be centered upon. R.C.M. 1105. “The post-trial procedure as revised by the Military Justice Act of 1983, Pub. L. No. 88-209, 97 Stat. 1393 (1983), places a heavier responsibility on the defense to take steps to ensure that matters [the appellant] wants considered are presented to the convening authority.” Manual for Courts-Martial, United States, App. 21, R.C.M. 1105(b)(2012).

 A defense counsel is ineffective when he makes a clemency request containing nothing from an accused unless counsel has the accused’s consent to do so prior to that submission. *See United States v. Johnson,* 51 M.J. 227 (C.A.A.F. 1999). In *Johnson,* the Court of Appeals for the Armed Forces (CAAF) held that the defense counsel’s failure to contact the appellant prior to review of, and response to, the SJAR was an error that prevented the submission of clemency matters from appellant to the convening authority, prejudicing appellant by denying him his best hope of sentence relief. *Id.* at 227. *See also United States v. Hood*, 47 M.J. 95 (C.A.A.F. 1997) (holding that defense counsel's performance was deficient because he failed to consult with his client concerning a clemency petition). Furthermore, CAAF rejected the contention that an accused had the duty to affirmatively contact his attorney or that failure to do so constituted waiver of his right to submit matters in clemency. *Johnson* 51 M.J. at 229.

 Although the R.C.M. 1105 submission is a right possessed by an accused, it is the defense counsel’s responsibility to ensure that such a submission is done adequately, and ensure that the wishes of the accused are carried out. This naturally requires communication between counsel and client and the client’s informed consent. *See* *United States v. Hick,* 47 M.J. 90 (C.A.A.F. 1997) (“Just as the accused controls the right to testify at trial, . . . the accused also has the right to submit or not submit material to the convening authority over defense counsel's objection.”); *United States v. Lewis* 42 M.J. 1, 4 (C.A.A.F. 1995) (“Counsel's duty is to advise, but the final decision as to what, if anything, to submit rests with the accused.”).

 As for the second *Strickland* prong, defense counsel’s failure to collect a statement from appellant and other letters of support left the convening authority with the impression that appellant was unconcerned about the result of his court-martial and deprived appellant of his right to make a personal plea to the convening authority for a reduction in his sentence. The showing of prejudice during clemency is remarkably low. *See United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (“Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant makes some colorable showing of possible prejudice.”) (Internal quotations and citations omitted).

 Defense counsel had a duty to communicate with appellant and, if necessary, assist appellant in writing a personal statement to the convening authority. Defense Counsel was ineffective because he failed to afford appellant the opportunity to submit a personal statement substantially prejudicing appellant’s right to submit matters in accordance with R.C.M. 1105. The same is true with defense counsel’s failure to collect and submit letters of support to the convening authority. The complete absence of evidence of appellant’s participation in preparing the clemency submission is by itself sufficient to make “some colorable showing of possible prejudice.” *Id*.

**B. Appellant Is Entitled To Conflict-Free Post-Trial Representation.**

 An allegation of ineffective assistance during post-trial processing creates a conflict of interest. *See* *United States v. Carter*, 40 M.J. 102 (C.M.A. 1994); *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992). An allegation of ineffective assistance of counsel constitutes good cause to sever the attorney-client relationship. *Id*. Appellant communicated to detailed defense counsel his desire to have another counsel handle his post-trial submission. *See* Appellant’s Affidavit. He told defense counsel shortly after trial that he had been ineffective and that he wanted another lawyer to handle the post-trial submission of matters to the convening authority. *See* Appellant’s Affidavit. Even after arriving at the confinement facility, appellant attempted to communicate his desire to sever the attorney-client relationship and hire a civilian attorney to handle the post-trial clemency submission. *See* DD Form 510.

 The breakdown in communication between detailed defense counsel and appellant is the responsibility of detailed defense counsel. It was defense counsel’s responsibility to respect the wishes of his client and if necessary seek clarification and guidance as to those wishes. Defense counsel’s failure to abide by appellant’s wishes led to the breakdown in communication and submission of an incomplete clemency request by a defense counsel with a conflict of interest. Appellant’s Sixth Amendment right to counsel was thus substantially prejudiced.

 This Court should return the record to the convening authority for new action and Appellant should be allowed to submit new matters pursuant to *United States v. Mendoza*, 67 M.J. 53 (C.A.A.F. 2008). WHEREFORE Appellant so prays.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

 I certify that the foregoing was delivered to the Navy-Marine Corps Court of Criminal Appeals, electronically filed, and that a copy was served on Appellate Government Division on 20 April 2015.

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1. A copy of Appellant’s Affidavit is enclosed for the court’s convenience. A separate motion to attach the Affidavit to the record of trial is filed contemporaneously with this brief. [↑](#footnote-ref-1)
2. A copy of the Laboratory Results is enclosed for the Court’s convenience. [↑](#footnote-ref-2)
3. A copy of the DD Form 510 is enclosed for the court’s convenience. A separate motion to attach the DD Form 510 to the record of trial is filed contemporaneously with this brief. [↑](#footnote-ref-3)