IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Darryl S. PHILLIPS
Major (O-4), U. S. Marine Corps

NMCCA 200400865 Decided 16 March 2006

Sentence adjudged 23 August 2002. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Corps Air Bases Western Area, MCAS, Miramar, San Diego, CA.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

HARTY, Judge

A general court-martial composed of officer members, convicted the appellant, contrary to his pleas, of conspiracy to steal government property, willful dereliction of duty, destruction of non-military government property, larceny of government property, wrongful appropriation of government property, conduct unbecoming an officer, four specifications of obstructing justice, three specifications of obtaining services by false pretense, obtaining personal services at government expense, and fraternization, in violation of Articles 81, 92, 109, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 909, 921, and 934. The members sentenced the appellant to a reprimand, five years of confinement, a $400,000 fine, but if not paid, to serve an additional five years of confinement, and dismissal. In an act of clemency, the convening authority disapproved the fine in excess of $300,000 and suspended the fine in excess of $200,000 for 24 months from the date of his action. Otherwise, the convening authority approved the sentence as adjudged and, except for the dismissal, ordered the sentence executed.

We have considered the record of trial, the appellant's 25 assignments of error,[1] the Government's Answer, the appellant's

[1] Due to the number of assigned errors, they are summarized as follows:

I. It is an unreasonable multiplication of charges to charge conduct unbecoming an officer and the act considered unbecoming as separate offenses.

II. It is an unreasonable multiplication of charges to charge obstructing justice by not returning evidence obtained by false pretense and the destruction of that same evidence as separate offenses.

III. Legal and factual sufficiency of convictions for destroying non-military Government property.

IV & V. Legal and factual sufficiency of convictions for obtaining services by false pretense.

VI & VII. The military judge abused his discretion by denying the motion to reopen the Art. 32, UCMJ, hearing, resulting in the denial of the appellant's U.S. CONST. amend. VI right of confrontation.

VIII. The convening authority was disqualified to act because he had granted immunity to Government witnesses.

IX. The convening authority erred by not granting the appellant's confinement deferral request.

X. Post-trial delay.

XI. The convening authority abused his discretion by denying the appellant's request for a post-trial Article 39(a), UCMJ, session.

XII. Racial and age discrimination because other prisoners have been processed out of the U.S. Disciplinary Barracks to receive their retirement pay and age discrimination because the approval of a dismissal denies him his retirement pay after he attains the age of 40.

XIII. The appellant was the victim of forum shopping because he was transferred from his command, Commander, Naval Air Force Pacific, to a Marine command for prosecution purposes.

XIV. Illegal pretrial confinement because forms of restraint less than confinement were not used.

XV. Unlawful command influence by multiple brig transfers that interfered with the appellant's attorney-client relationship.

XVI. Multiple brig transfers, 274 days in special quarters, brig conditions, and his security level in the brig are cruel and unusual punishment.

XVII. A lack of law library access in the brig hampered the appellant's ability to represent himself post-trial.

XVIII. Prosecutor misconduct by requesting the Secretary of the Navy to rescind the appellant's end of tour award.

reply, the appellant's supplemental brief asserting three additional assignments of error,[2] the Government's Answer to the appellant's supplemental pleadings, and the appellant's two pro se filings of issues in affidavit form pursuant to *United States v. Grostefon*.[3] We find merit in the appellant's first and second assignments of error and we will take corrective action. Otherwise, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, as the Aviation Supply Officer for Marine Aircraft Group FORTY-SIX (MAG-46) stationed at Marine Corps Air Station (MCAS) Miramar, California, was the approving official for all purchases, including those made on government procurement cards (hereinafter credit cards). The credit cards were assigned to various personnel in the Aviation Supply Division for the purpose of purchasing items that were not available in the supply system. Each of these credit cards had a $2,500.00 per purchase limit and a $25,000.00 per month limit.

XIX. Military judge abused his discretion by denying the appellant's request for an investigator.

XX. Military judge abused his discretion by denying the appellant's request for his original detailed defense counsel to assist at trial.

XXI. The appellant's privileged mail has been tampered with.

XXII. Ineffective assistance of counsel during the post-trial period.

XXIII. Inadequate medical care.

XXIV. The military judge abused his discretion by not disqualifying the trial counsel because the trial counsel was junior to the appellant.

XXV. Factual and legal sufficiency of the evidence to support a finding of guilty of larceny.

[2] Supplemental I. The fine enforcement hearing officer abused his discretion by finding the appellant was not indigent.

Supplemental II. RULE FOR COURTS-MARTIAL 1107(d)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2004 ed.) prevents the execution of a fine enforcement provision.

Supplemental III. The fine enforcement hearing convening authority lacked the authority to act in that capacity because the appellant was assigned to the U.S. Disciplinary Barracks.

[3] 12 M.J. 431 (C.M.A. 1982).

The appellant solicited the assistance of, and conspired with, key military members of the MAG-46 and Marine Aviation Logistics Squadron ELEVEN (MALS-11) Aviation Supply Divisions, to defraud the Government by taking advantage of weaknesses in the credit card system. The scheme involved generating fraudulent credit card purchases for non-existent products from phantom companies set up by the appellant and his co-conspirators. Credit card holders not involved with the conspiracy would notice charges appearing on their monthly statements, whereupon the conspirators told them the charges were authorized purchases and would be taken care of.

The appellant created two shell companies (D-Network and SD High Tech Supplies),[4] and helped three civilians establish one shell company each (Dynamic Components, California Express Supplies, and Texas Depot Supplies) for the purpose of fraudulently contracting with the Government through the MAG-46 and MALS-11 Aviation Supply Divisions. Each shell company owner then contracted with a credit card processing company to process all credit card purchases from that shell company. The purchase amount of each order, minus a small processing fee, was deposited by the credit card processing company into the shell company's bank account. Except for several computers and printers purchased through the appellant's shell company, the Government did not receive any products from these shell companies.

When the monthly credit card statements came in, the charges were approved by the conspirators and the Government paid the fraudulent charges. The civilian co-conspirators kept a portion of the funds deposited in their accounts, and transferred the balance to the appellant. The military co-conspirators received checks directly from the appellant or his shell company as compensation. During the course of the conspiracy, more than $400,000 in fraudulent charges involving the shell companies were placed on credit cards and paid.

Prior to trial, the Government agreed to return four specific items seized from the appellant's home. The appellant and his civilian counsel requested that the lead Naval Criminal Investigative Service (NCIS) agent retrieve the evidence from the evidence facility and make it available at the MCAS Miramar NCIS office. Rather than wait for the agent to make the evidence available, the appellant went to the NCIS evidence facility in uniform, presented an email authorizing return of the four specific items of evidence, and requested the evidence in his case. An evidence custodian, thinking the appellant was the victim, released several boxes of evidence, far in excess of the items listed in the email, to the appellant. The appellant returned several hours later stating he had received evidence that did not belong to him and returned some of the evidence. A

[4] The appellant changed his shell company's name from D-Network to SD High Tech Supplies.

different evidence custodian received the evidence back, and noticed items had been tampered with and others were missing. The lead NCIS agent was able to recreate what was missing, because he had made copies of the original documents before he entered them into evidence. The appellant was placed into pretrial confinement shortly thereafter to prevent further acts of obstruction.

Following trial, in June 2005, a fine enforcement hearing was conducted to determine whether the appellant had made a good-faith effort to pay his $200,000 fine, whether he was indigent, and whether an alternative to confinement would satisfy the Government's interest in punishment. The hearing officer determined from the evidence presented that the appellant had engaged in asset shifting by transferring his interest in several pieces of real property to his wife. It was also determined that the appellant's wife obtained a divorce from the appellant in 2004, but there was no property settlement involved. Based on this information, the hearing officer determined the fine enforcement provision should be invoked resulting in the appellant serving an additional five years of confinement.

Unreasonable Multiplication of Charges

For his first two assignments of error, the appellant asserts an unreasonable multiplication of charges. These claims are based on: (1) charging the appellant with conduct unbecoming an officer (Charge IV) for encouraging subordinates and civilians to participate in criminal acts, and also charging the same actions as a conspiracy in a separate charge (Charge I); and (2) charging the appellant with obstruction of justice by not returning evidence he obtained by false pretense, and also charging him with destruction of that same evidence as non-military government property. Appellant's Brief of 29 Oct 2004 at 8, 10.

1. Conduct unbecoming an officer.

Although the appellant raises this issue as one of an unreasonable multiplication of charges, we resolve the issue as one of multiplicity and grant relief.

Offenses are multiplicious if one is a lesser included offense of the other. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002); *United States v. Cherukuri*, 53 M.J. 68, 72 (C.A.A.F. 2000). The issue whether offenses stand in the relationship of greater and lesser included is a question of law that we review de novo. *See Cherukuri,* 53 M.J. at 71; *United States v. Rodriquez*, 18 M.J. 363, 369 n.4 (C.M.A. 1989).

Article 133, UCMJ, "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." MANUAL FOR COURTS-MARTIAL, UNITED STATES

(2002 ed.), Part IV, Paragraph 59c(2). Whenever a specific offense is also charged as conduct unbecoming an officer, "the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman." *Id*. Thus, when a specific offense is also charged as a violation of Article 133, the specific offense is the lesser included offense. *See Palagar*, 56 M.J. at 297 (larceny necessarily included in conduct unbecoming an officer by making unauthorized purchases with an IMPAC card); *United States v. Frelix-Vann*, 55 M.J. 329, 331 (C.A.A.F. 2001) (larceny necessarily included in conduct unbecoming by committing larceny); *Cherukuri*, 53 M.J. at 73-74 (four indecent assaults included in conduct unbecoming by committing the four indecent assaults); *United States v. Harwood*, 46 M.J. 26, 28-29 (C.A.A.F. 1997)(fraternization under Article 134 included in conduct unbecoming by fraternizing under Article 133); *Rodriquez*, 18 M.J. at 369 (possession and use of marijuana under Article 134 (before enactment of Article 112a) included in conduct unbecoming by possession and use of marijuana under Article 133).

A review of the record of trial convinces us that the "subordinates and civilians" referred to in Charge IV are the same specifically named military members and civilians identified in Charge I. We are also convinced that the "encourag[ing]" of civilians and subordinates to commit specific acts alleged in Charge IV is the same as the conspiring with the same civilians and military members and "arrang[ing]" the commission of specific acts by those people in Charge I. Both charges deal with fraudulently processing claims in order to steal government property in the form of currency. During pretrial motions litigation, the appellant's civilian counsel challenged these two specifications as multiplicious. We agree that the conspiracy charged in Charge I is multiplicious with conduct unbecoming an officer in Charge IV. We will take corrective action in our decretal paragraph.

2. Obstructing justice.

As a result of obtaining and not returning specific pieces of evidence, the appellant was charged in Second Additional Charge I and its sole specification with destruction of the missing evidence, and under Second Additional Charge II, Specification 4, with obstructing justice by gaining access to that same evidence by false pretense and not returning that same evidence. The appellant raised this issue by pretrial motion, and the Government stated the two charges were for contingencies of proof. *Id*. at 239, 242, 1264. The military judge instructed the members these charges were multiplicious for sentencing and should be treated as one conviction. *Id*. at 1464; AE-CXIX.

In determining whether there is an unreasonable multiplication of charges, this Court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim. App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In this case, the first *Quiroz* factor was satisfied by the defense raising this issue during pretrial motions. Applying the second *Quiroz* factor, the fact that destruction of missing evidence was only an alternate prosecution theory to the obstruction of justice also indicates an unreasonable multiplication of charges. With respect to the third *Quiroz* factor, by alleging the same criminal act alternatively in two specifications, the appellant's criminality is exaggerated. However, since the military judge instructed the members these two convictions were multiplicious for sentencing, thus the two separate charges did not expose the appellant to greater punishment. As to the fifth *Quiroz* factor, we find no evidence of prosecutorial overreaching in the drafting of the charges, because the trial counsel admitted these charges were for contingencies of proof only. On balance, however, the *Quiroz* factors favor a finding of unreasonable multiplication of charges. The charges were clearly for contingencies of proof and are alternate theories of guilt as to the same acts.

While the appellant urges us to dismiss the charge of obstructing justice charged under Second Additional Charge II, Specification 4, we decline to do so. We find it more appropriate to dismiss the charge of destroying non-military Government property charged under Second Additional Charge I and its sole specification. As drafted, Specification 4 of Second Additional Charge II more appropriately describes the appellant's criminal conduct. We will take corrective action in our decretal paragraph.[5]

Legal and Factual Sufficiency

For his fourth and fifth assignments of error, the appellant challenges his convictions for obtaining, by false pretense, services from credit card service providers as charged in Charge V, Specifications 3, 4 and 5. Specifically, the appellant alleges that, as to Specification 3, the

[5] Our holding moots the appellant's third assignment of error claiming there was insufficient evidence to support a finding of guilty as to the destruction of non-military Government property charged in the sole Specification under Second Additional Charge I. Appellant's Brief at 12.

evidence established that he had a valid contractual relationship with 1st National Processing, that all transactions processed were in accordance with that contract and that, therefore, there existed no false pretenses. As to Specifications 4 and 5, the appellant asserts that the evidence established that other people may have had a contractual relationship with the named credit card service providers, however, the evidence did not establish that he was involved in processing credit card charges through those service providers. Appellant's Brief at 15-19. We disagree and decline to grant relief.

The tests for legal and factual sufficiency are well-known. For legal sufficiency, we consider the evidence in the light most favorable to the Government, and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. For factual sufficiency, we weigh all the evidence in the record of trial, recognizing that we did not see or hear the witnesses, and determine whether we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict. *Reed*, 51 M.J. at 562.

1. Charge V, Specification 3

The appellant was charged with, and found guilty of, obtaining credit card processing services from 1st National Processing by false pretense. This offense has six elements:

(1) That the accused wrongfully obtained certain services;

(2) That the obtaining was done by using false pretenses;

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with the intent to defraud;

(5) That the services were of a certain value;

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶ 78b.

The appellant established D-Network as a shell company to collect fraudulent credit card charges from the Government. In order to process these credit card charges, the appellant, as owner of D-Network, contracted with the Bank of Oakland (Bank) and 1st National Processing. Prosecution Exhibit 30. 1st National Processing agreed to process all valid charges for a fee of 2.25% of the amount presented. *Id*. at 2. All credit card charges were manually entered by the appellant. During the period 1 April 1999 to 31 October 2000, a total of $157,424.00 in government charges to D-Network and an additional $49,649.66 to its successor, SD High Tech Supplies were processed.[6] The net proceeds were deposited into a Wells Fargo bank account owned by the appellant. Record at 1165; Appellate Exhibit CVIII.

Under the credit card processing contract, the appellant agreed to the following provisions:

> 2.14. DEPOSIT OF FRAUDULENT TRANSACTIONS. [The appellant] shall not accept or deposit any fraudulent Transaction . . . .
>
> 2.19. WARRANTIES OF MERCHANT. [The appellant] hereby provides the following warranties to Bank and [1st National Processing]: . . . (e) Each Sales Draft presented to Bank for collection is genuine and is not the result of any fraudulent transaction . . . .

Prosecution Exhibit 30 at 5. In return, 1st National Processing and the Bank agreed to "accept from [the appellant] *all valid Sales Drafts* deposited by [the appellant] under the terms of this Agreement and shall present the same to the appropriate Card issuer for collection against all cardholder accounts. . . ." *Id*., paragraph 3.01. (Emphasis added).

The evidence shows that the appellant received the credit card processing services. He obtained those services by fraudulently entering into the service contract. The appellant, at the time he entered into the contract, knew the credit card charges were going to be fraudulent, however, by signing the contract he gave an express warranty that they would not be. He entered into the credit card processing contract with the intent to deceive 1st National Processing into believing that D-Network was a legitimate business, the credit transactions would be valid, and the appellant would not present fraudulent credit transactions under the contract. Deceit was necessary in order to fulfill the appellant's

[6] 1st National Processing also processed $82,993.22 of credit card charges through California Express Supplies, owned by co-conspirator MF. All charges were made on three government credit cards held by co-conspirators. Record at 1165-67; Prosecution Exhibit 21; Appellate Exhibit CVIII.

intent to defraud 1st National Processing of its services. Each and every fraudulent credit transaction presented by the appellant for processing was with the intent to defraud 1st National Processing of its services.

We are satisfied that a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. We are equally convinced ourselves of the appellant's guilt beyond a reasonable doubt.

2. Charge V, Specification 4

The appellant was charged with, and found guilty of, obtaining credit card processing services from Cardservices International by false pretense. This offense has the same six elements stated above. The facts supporting this Specification, however, differ dramatically from those presented with regard to Specification 3.

Cardservices International provided credit card processing services to Dynamic Components owned by BA, an individual suffering multiple physical maladies who was befriended by the appellant. During the period 1 February 2000 to 31 August 2000, credit charges totaling $33,090.50 were processed in return for 2.35% of the charges plus a flat transaction fee. The net proceeds were deposited into a Bank of America account owned by BA. Record at 1164; Appellate Exhibit CVI; Prosecution Exhibit 29 at 2. The appellant did not own Dynamic Components, and did not have a contract with Cardservices International to provide anything. There is, however, more to this story.

Dynamic Components was established by BA as early as 20 January 2000. Prosecution Exhibit 29 at 7. BA applied for services from Cardservices International on 4 February 2000 listing "D. Network Computer Sales" as a reference with a contact person named "Darryl" who could be reached at "858-616-7544." *Id*. at 1 and 4. The appellant's first name is "Darryl," he owned D-Network rather than "D. Network Computer Sales," and the reference contact phone number is not the same number the appellant used in any of the D-Network applications or its business card. Prosecution Exhibits 22 and 30.

BA testified that the appellant helped him set up Dynamic Components in order to contract with the Government. BA filled out the business license application and the Cardservices International application and agreement.[7] Dynamic Components had a $1,200.00 per charge limit and the appellant

[7] Although BA's credit card service application and agreement incorporates a Merchant Agreement by reference, a copy of that agreement is not in evidence. Prosecution Exhibit 29 at 4.

recommended that BA have that increased to $2,500.00 per charge, which is the maximum per charge limit on the government credit cards. MF, a co-conspirator, sent BA a fraudulent receipt showing a credit purchase from Dynamic Components so BA could send that to Cardservices International to establish his business volume. All credit card charges processed by Cardservices International for Dynamic Components came from three government credit cards held by named military co-conspirators. *Id*. at 1164; Appellate Exhibit CVI; Prosecution Exhibit 7 at 13 and 69.

Other than selling drugs on the street, BA did not have any business experience. As the owner of Dynamic Components, BA did not keep records, did not send any products to clients, never talked to a client, did not know where the credit card transactions came from, and relied on the appellant for business decisions. The appellant or MF would tell BA when money had been deposited in his account. BA would then transfer the majority of those funds from the Dynamic Components account to the appellant. The evidence makes clear that the appellant used BA as part of the overall conspiracy to create an additional shell company to run fraudulent credit card charges through, and to provide the appellant with one level of criminal liability insulation.

The military judge instructed the members on the law of principals, including criminal liability based on aiding and abetting a principal who commits the crime. Record at 1370. The appellant's participation in obtaining credit card processing services from Cardservices International by false pretense clearly falls within this theory of criminal responsibility. *See* Art. 77a(1), UCMJ. Under this theory, we are satisfied that a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. We are equally convinced ourselves of the appellant's guilt beyond a reasonable doubt.

3. Charge IV, Specification 5

The appellant was charged with, and found guilty of, obtaining credit card processing services from Card Payment Systems by false pretense. This offense has the same six elements stated above. The facts supporting this specification are very similar to those presented on Specification 4 involving BA and Dynamic Components.

Card Payment Systems provided credit card processing services to Texas Depot Supplies owned by JPS, the appellant's sister. During the period 1 April 2000 to 31 March 2001, credit charges totaling $80,734.96 were processed in return for 2.15% of the charges plus additional fees. All credit card orders came from the same three credit cards used with Dynamic Components. The net proceeds were deposited into a Bank of America account owned by JPS. Record at 1165;

Appellate Exhibit CVII; Prosecution Exhibit 28 at 2. The appellant did not own Texas Depot Supplies and did not have a contract with Card Payment Systems to provide anything directly for him.

JPS created Texas Depot Supplies as early as 21 January 2000. Prosecution Exhibit 2 at 1; Prosecution Exhibit 28 at 7. On 28 April 2000, JPS contracted with Card Payment Systems to provide credit card processing services, estimated $20,000 per month in sales with an average $2,500.00 per transaction, and represented that she would be selling from "just in time inventory." Prosecution Exhibit 28. Although JPS testified, she did not testify about her company or the appellant's relationship to that company. Record at 639-46. Her application for credit card services, however, shows JPS used two of the shell companies and their owners as merchant references, including the appellant. Prosecution Exhibit 28 at 1. The appellant used a Government Federal Express account to ship unknown items from his office to JPS's home address in Lancaster, Texas. Record at 1068-94; Prosecution Exhibit 17 at 1-8. JPS transferred at least $22,518.00 to the appellant. Prosecution Exhibit 8 at 5-19.

As with Dynamic Components, everything about Texas Depot Supplies shows the appellant's coordination and control. The familial relationship between JPS and the appellant, the use of the appellant and his shell company as a merchant reference, the use of the same credit cards, and the return flow of money, all show the appellant was running this show, as well. Each and every fraudulent credit transaction presented by Texas Depot Supplies for processing was with the intent to defraud Card Payment Systems of its services.

The appellant's participation in obtaining credit card processing services from Card Payment Systems by false pretense clearly falls within the military judge's instruction on criminal responsibility. Under this theory, we are satisfied that a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. We are equally convinced ourselves of the appellant's guilt beyond a reasonable doubt.

Convening Authority Disqualification

The appellant summarily asserts, as his eighth error,[8] that the convening authority (CA) was disqualified from acting

[8] Because the record establishes that there was no *ex parte* communication between the trial counsel and investigating officer, the appellant withdrew his sixth assignment of error concerning the military judge's denial of the appellant's motion to reopen the Article 32, UCMJ, investigation claiming an *ex parte* communication. We decline to grant relief as to the appellant's seventh alleged error, summarily assigned pursuant to *United States v.*

on his case as the result of his having granted immunity to a co-conspirator. We find no basis for a conclusion that he was, by granting immunity, unable to objectively and impartially weigh the evidence of record before him. *United States v. Vith*, 34 M.J. 277, 279-80 (C.M.A. 1992). Nor do we find any "'direct, unattenuated causal relationship'" between the grant of immunity and the action by the CA before us. *United States v. Sorrell*, 47 M.J. 432, 433-34 (C.A.A.F. 1998) (quoting *United States v. Turcsik*, 13 M.J. 442, 445 (C.M.A. 1982)). In fact, the CA granted clemency by disapproving $100,000 of the fine and suspending another $100,000 of the fine for 24 months from the date of his action.

Failure to Respond to Confinement Deferral Request

For his ninth assignment of error, the appellant avers that the CA abused his discretion by not responding to a request to defer confinement, and asks this court to disapprove the dismissal. The Government concedes it was error for the CA not to respond to the deferral request, but argues that the CA's order executing the adjudged confinement is tantamount to a denial and that the appellant has not been prejudiced thereby. We review the denial of a request for confinement deferment for an abuse of discretion. *United States v. Brownd*, 6 M.J. 338, 340 (C.M.A. 1979).

On 24 November 2003, the appellant submitted a written request for deferment to the CA requesting confinement be deferred for the period of appellate review. The staff judge advocate (SJA) interpreted the request as one for clemency,[9] and did not immediately forward the request to the CA for consideration. The SJA did not refer to the deferment request in his SJA's recommendation, however a copy of the request was an enclosure to the appellant's clemency material that was sent to the CA for consideration. The SJA did not specifically reference the request in his SJA's recommendation addendum. The CA took his action on 10 June 2004, approving the confinement and ordering it executed, stating that he considered the clemency matters submitted on the appellant's behalf.

"When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based." *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992)(footnote omitted). This assumes, of course, that the request was actually seen and

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Grostefon, because it is also dependent on the existence of the same *ex parte* communication.

[9] The appellant's request had the proper subject line, however, the text of the request did not follow the considerations outlined in R.C.M. 1101(c)(3).

considered. We consider the CA's action of ordering the sentence executed tantamount to denying the deferral request after due consideration. In order to comply with our superior court's mandate in *Sloan*, however, it would have been necessary to articulate the reasons for denying the deferral request in the CA's action. The CA failed to do so and we find, therefore, that he erred. Thus, we must independently review the facts of this case and determine whether deferment was appropriate, and if it was, what remedy should follow. *See Longhofer v. Hilbert*, 23 M.J. 755, 759-60 (A.C.M.R. 1986).

Our analysis of the factors enumerated in RULE FOR COURTS-MARTIAL 1101(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) convinces us that it would have been inappropriate to grant the requested deferral. The appellant showed a willingness to obstruct investigations and his own prosecution through witness manipulation and tampering with evidence. That evidence implicated a civilian co-conspirator. While the courts-martial of military co-conspirators may have already ended, there is no showing that the federal investigations and prosecutions of civilian co-conspirators had concluded at the time the CA took his action. One of these civilian co-conspirators was the appellant's close female friend and another was his sister.

Unlike the accused in *Longhofer*, the appellant's confinement had not been previously deferred, there was no hope that the appellant would return to duty, his dismissal all but ensured the loss of accrued retirement benefits, and the appellant's wife divorced him in 2004. Under these circumstances, we find the appellant did not suffer any prejudice from the CA not reducing his deferment decision to writing detailing specific reasons for denial.

Post-Trial Delay

The appellant summarily asserts, as his tenth error, that he has been prejudiced by the amount of time that elapsed between announcement of sentence and authentication of the record of trial.[10] The specific prejudice alleged includes missing his mandatory Clemency Review Board and Scheduled Parole Board, submitting his R.C.M. 1105 matters without aid of the record of trial, and a delayed Veteran Administration claim for disability.

We consider four factors in determining whether post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal,

[10] The appellant claims 596 days elapsed during this period of delay. Sentence was announced on 23 August 2002 and the record was authenticated on 9 January 2003. We do not know how the appellant came up with 596 days of delay.

and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey*, 60 M.J. at 102).

Here, the appellant's focus is on the period of delay from sentencing to record authentication, however, we will consider the entire period of post-trial delay. We do not find the entire period of post-trial delay to be facially unreasonable. Even if it was facially unreasonable, we would not grant relief.

It took less than three years from the date of trial until the appellant's case was docketed with this court. The trial ended on 23 August 2002, the record of trial was authenticated on 28 January 2003, the CA took his action on 10 June 2004,[11] and the record was docketed with this court on 21 July 2004. The record of trial consists of just under 1,500 pages with an additional eight volumes of exhibits. The appellant's 28 assignments of error are indicative of the complexity of the issues in this case. Thus, we find that the record itself and the allied papers provide an adequate explanation for the delay.

The appellant did assert a demand for timely post-trial review while awaiting the CA's action, and received clemency in response. The alleged prejudice includes the delayed opportunity to meet with his clemency and parole board, having to file clemency matters without the aid of the record of trial, and a delay in filing a request for a Veterans Administration disability rating. The claimed prejudice concerning parole and requesting a disability rating appear to have resolved themselves once the CA acted on 10 June 2004. As to the clemency matters, they were submitted and clemency was granted.

We are aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown,* 62 M.J. 602, (N.M.Ct. Crim.App. 2005)(en banc).

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[11] The appellant received two extensions during this period to file clemency matters and to respond to the SJA's recommendation.

Fine Enforcement Hearing

The appellant raises three supplemental assignments of error concerning his fine enforcement hearing. First, he avers the hearing officer erred by finding the appellant was not indigent and that alternative means of fine collection were inadequate. Second, he asserts that the CA's supplemental action converting the fine into confinement under R.C.M. 1113(d)(3) was prohibited by R.C.M. 1107(d)(1). Third, the appellant summarily claims the wrong CA took action to convert the fine into confinement.[12]

The appellant's original sentence included a $400,000 fine with an enforcement provision requiring the appellant to serve an additional five years of confinement if he did not pay the fine. After the CA granted clemency, the appellant owed a $200,000 fine that became due and owing at the time the sentence was ordered executed. R.C.M. 1003(b)(3), Discussion. A fine enforcement provision is not punishment; it is a tool to enforce collection of the fine and can be transformed into punishment when the fine is not paid. *See United States v. Tuggle,* 34 M.J. 89, 91-92 (C.M.A. 1992); *United States v. Rascoe*, 31 M.J. 544, 552 (N.M.C.M.R. 1990).

Our superior court has determined that the following standards apply to fine enforcement hearings:

> [T]he convening authority must afford the person fined notice and an opportunity to be heard. R.C.M. 1113(d)(3). At this contingent confinement hearing, a convicted service member subject to a fine has the burden of demonstrating that, despite good faith efforts, he has been unable to pay the fine 'because of indigency.' *Id*. If the service member demonstrates that he cannot pay the fine because of indigency, the contingent 'confinement may not be executed for failure to pay a fine . . . unless the authority considering imposition of confinement determines . . . that there is no other punishment adequate to meet the Government's interest in appropriate punishment.' *Id.*

United States v. Palmer, 59 M.J. 362, 364-365 (C.A.A.F. 2004)(citing *Tuggle*, 34 M.J. at 91 and *United States v. Soriano*, 22 M.J. 453, 454 (C.M.A. 1986))(footnote omitted).

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[12] We have considered the appellant's second and third supplemental assignments of error and find that R.C.M. 1107(d)1) does not prohibit the execution of a fine enforcement provision in this case, and that the Commanding General, Marine Corps Base Camp Pendleton is a proper general court-martial convening authority to act in this matter. We decline to grant relief on these issues.

We review the decision to convert a fine into confinement for an abuse of discretion. *Rascoe*, 31 M.J. at 571. During that review we look at: (1) findings of fact as to the appellant's indigency status; (2) the appellant's opportunity to pay the fine and his efforts to acquire the funds to pay the fine; (3) the alternative measures considered; and, (4) and whether those alternatives are inadequate to meet the Government's interest in punishment and deterrence. *Id*. First, however, we must assure ourselves that the appellant was afforded his due process rights.

The appellant was provided notice of hearing and was detailed counsel to represent him at that hearing. He was personally present at the hearing, provided the opportunity to challenge evidence presented by the Government, and was provided an opportunity to testify and present other evidence on the relevant issues.[13] There is no dispute that the appellant was afforded the due process rights to which he was entitled.

At the fine enforcement hearing, the appellant submitted 80 exhibits establishing his assets, debts, and fine payment history. Fine Enforcement Hearing Report of 13 Jul 2005 (Report) at enclosure (6). Those documents, taken together, show assets limited to a joint tenancy interest in one piece of real property with his ex-wife, a motorcycle, and a car. Debts included a student loan, credit cards, and presumably a mortgage against the joint tenancy property. The appellant calculated he had no more than $132,000 of total equity in the listed property. The appellant had been making payments against his fine at the rate of approximately $25.00 to $100.00 per payment with the earliest payment made on 30 July 2003. A total of $790.00 had been paid toward the $200,000.00 fine at the time of hearing. Based on this evidence, the appellant asserted that he was unable to pay the fine because of indigency, and that he had made a good faith effort under the circumstances to pay the fine. The appellant offered, through statements of counsel, to pay his fine at the rate of $554.77 per month over 30 years if he is denied retirement pay, or $1,040.20 per month if retirement pay is approved. He also offered to liquidate assets, including his interest in the one piece of real property, once he was released from confinement. Report at enclosure (5), 24-25.

The appellant's assertion of indigency was rebutted by the Government in the form of four exhibits related to real property in which the appellant had a prior ownership interest. Report at enclosure (7), exhibits 7-10. According

[13] We note that the appellant refused to answer any question directed to him by the hearing officer except when asked by whom he wished to be represented. On all other occasions his detailed counsel answered for him. Fine Enforcement Hearing Report of 13 Jul 2005 at enclosure (5), 1-26.

to these exhibits, the appellant transferred his interest in two pieces of real property to his wife on 13 August 2002, the second day of his court-martial, and his interest in a third piece of real property on 27 August 2002. No money changed hands for these transfers, and there was approximately $350,000 of equity in these properties. In December 2004, approximately, four months after the appellant's divorce, which did not include a property settlement, the appellant's then ex-wife took out a $175,000 mortgage against one of the properties transferred to her during the court-martial. This is on top of the more than $200,000 the appellant directly received in his fraudulent credit card scheme.

Based on the above information, the hearing officer entered 27 detailed findings of fact supporting 16 individual conclusions. In these conclusions, the hearing officer found by a preponderance of the evidence that the appellant is not indigent, that he has assets available to him to pay the fine, that the appellant engaged in asset shifting to avoid payment of the fine, that the appellant did not make bona fide efforts to pay the fine, and that alternatives offered by the appellant were not adequate to meet the Government's interest in the adjudged sentence. Report at 1-6.

In this case, we find nothing in the record to cause us to question the hearing officer's findings. Each factual finding is well founded in the evidence presented, and each conclusion logically flows from, and is supported by, the factual findings. The hearing officer's findings are not clearly erroneous, and, therefore, he did not abuse his discretion. The convening authority ordered the additional confinement executed after consideration of the hearing officer's report and the appellant's multiple submissions.[14] We find that the convening authority properly exercised his authority and did not abuse his discretion in taking his supplemental action.

Conclusion

The findings of guilty as to Charge I and its sole specification and Second Additional Charge I and its sole specification are set aside and those specifications and charges are dismissed. The remaining findings are affirmed. Following our action, we must reassess the sentence. *United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990). Notwithstanding the dismissal of these charges and specifications, no diminution of the underlying conduct arises, and considering the facts and circumstances of record in this case, we are convinced that the court-martial would not have adjudged a lesser sentence if the errors had not occurred at trial. The sentence, as approved by the convening

[14] Supplemental Court-Martial Order of 22 July 2005.

authority, is affirmed.[15] We direct that the supplemental court-martial order reflect the findings of this court.

Senior Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

[15] We have considered the remaining assigned errors, not specifically addressed herein, and find each to be without sufficient merit to warrant comment or relief.