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

BEFORE

J.W. ROLPH **C.L. SCOVEL** **J.D. HARTY**

UNITED STATES

v.

Gilbert T. ALLENDE
Mess Management Specialist Second Class (E-5), U. S. Navy

NMCCA 200001872 Decided 11 July 2006

Sentence adjudged 22 September 1999. Military Judge: S. Jamrozy. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, Naval District Washington, Washington, DC.

LCDR JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT ELYSIA NG, JAGC, USNR, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel
LtCol KATHLEEN K. TREMBLAY, USMCR, Appellate Government Counsel

HARTY, Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial, composed of officer and enlisted members, of violating a lawful order, larceny (four specifications), and obtaining services by false pretenses, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934. His sentence included a bad-conduct discharge, confinement for one year, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have reviewed the record of trial, the appellant’s declaration, the appellant's 10 assignments of error, the Government's response, and the appellant’s reply. We conclude that excessive post-trial delay requires sentencing relief. 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.

Speedy Trial

For his first assignment of error, the appellant claims that the military judge abused his discretion in finding that the Government had not violated the appellant's RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) right to speedy trial. The appellant specifically challenges whether periods of delay were properly excluded, and whether the speedy trial clock began with the original preferral of charges or a subsequent preferral following dismissal of the original charges. Appellant's Brief of 7 Jul 2003 at 6.

The Government's motion to exclude delay and the appellant's motion to dismiss were litigated prior to trial. The only evidence presented was the stipulated chronology, Appellate Exhibit XV, and the appellant's testimony. The military judge granted the Government's motion, finding that the period from 24 March 1999 to 24 May 1999, a period of 61 days, was excludable delay, because the individual military counsel (IMC) requested that delay. The military judge also denied the appellant's motion to dismiss, because, after subtracting the 61 excluded days, the Government was within the 120-day R.C.M. 707 requirement. Record at 25-26.

The military judge did not address, because the appellant did not raise, any issue concerning delay exclusions granted by the convening authority (CA) or whether the prior dismissal of charges was a sham. Therefore, the Government was never called upon at trial to account for these periods or to defend the dismissal of the original charges and preferral of new charges as a "sham." The military judge had no cause to rule on the CA's prior grants of excludable delay or the allegation of a sham dismissal. We will not find that the military judge abused his discretion on issues never brought before him at trial.

We hold that the appellant waived the issue of Government accountability for any periods of delay excluded by the CA and the "sham dismissal" issue by failing to assert them at trial. R.C.M. 907(b)(2)(A); *see United States v. Duncan*, 34 M.J. 1232, 1237 (A.C.M.R. 1992)(citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)). Thus, we will limit our review of the military judge's ruling to the specific issues presented at trial.

R.C.M. 707 provides that the "accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges, (2) the imposition of restraint . . ., or (3) entry on active duty. . . ." In this case, the triggering date for the 120-day rule was the preferral of charges on 18 September 1998. At trial, the appellant challenged the period of delay occurring after referral of charges and the retroactive granting of excludable delay for any portion of that period. AE X. The charges were referred on 12 March 1999 and the appellant was arraigned on 24 May 1999.

The Government moved to exclude the period 24 March 1999 through 23 May 1999, a period of 61 days, because the Government had requested, on 12 March 1999, to go to trial on 24 March 1999.[1] Based on his schedule, the IMC requested to go to trial on 24 May 1999, and the docketing judge granted that request. AE XV. The appellant argued that the 61 days between the Government's requested trial date and the appellant's requested trial date has nothing to do with arraigning the appellant. That is, the fact the appellant is not ready to go to trial does not prevent the Government from arraigning him. The appellant never demanded speedy trial.

Following an R.C.M. 802 conference, the military judge summarized the discussion, as it pertained to an accounting of delay, as follows:

> Essentially we hashed out some accounting of days that are based on what appears in Appellate Exhibit XV. It appears that the entire period from the preferral of these charges on 18 September 1998 until referral of [these charges on] 12 March [1999] comprised a period of 175 days. Of that 175 days, 104 were excluded or considered to be approved delay by the convening authority. Now, that left a total of 71 days. Also from the date of referral, which is 12 March [1999], until the date of arraignment, which is today, that calculates out to be 73 days.

Record at 21. Neither party had anything else to put on the record concerning this accounting. *Id*. We will treat the military judge's statements as part of his findings of fact.

[1] Although the Government represented it was ready to go to trial on 24 March 1999, it did not serve the appellant with charges until 18 May 1999. Charge Sheet. When questioned about that issue, the trial counsel stated that the Government would have met the five-day service requirement for a 24 March 1999 trial date. Record at 24.

The military judge also found that the 61 days requested by the Government should be excluded from the 73 days that elapsed after referral, based on the IMC's request for that delay. *Id*. at 25-26.

We apply differing standards of review to the two portions of a military judge's speedy trial ruling. The findings of fact are entitled to substantial deference and will be reversed only for clear error. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)(quoting *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995)). The military judge's legal conclusions, however, are reviewed *de novo*. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003).

The military judge's findings of fact, agreed to by the parties, are supported by the record and are not clearly erroneous. We adopt those findings as our own. Although we are not required to defer to the military judge's legal conclusions, we find no reason in law to disagree with the military judge's legal conclusions concerning granting the Government's motion to exclude delay or in finding there was no speedy trial violation. *Doty*, 51 M.J. at 465. According to the findings of fact, a total of 248 days elapsed between preferral and arraignment. From that period, the CA approved 104 days of excludable delay, and the military judge properly approved 61 days of excludable delay. Therefore, the appellant was brought to trial on day 83. This issue is without merit.

Expert Assistance

For his fourth assignment of error,[2] the appellant claims that the military judge abused his discretion by denying the appellant's request for an independent and confidential expert witness to assist in reviewing the Government's expert witness' analysis of a stolen computer. Appellant's Brief at 21. We disagree.

[2] We have reviewed the record of trial for factual and legal sufficiency pursuant to Article 66(c), UCMJ, and find the appellant's second assignment of error, challenging the legal and factual sufficiency of the evidence to support Specifications 1, 2, 3 and 5 under Charge II and the specification under Charge III, to be without merit. We also find the appellant's third assignment of error, concerning whether a machete is a dangerous weapon, to be without merit. *See United States v. Palmer*, 41 M.J. 747, 749-750 (N.M.Ct.Crim.App. 1994)(holding that the concept of "dangerous weapon" for violation of an order prohibiting possession of a dangerous weapon is different than the concept of "dangerous weapon" based on the use of that weapon).

An accused is entitled to an expert consultant's assistance to aid in the preparation of his defense upon a demonstration of necessity. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)(citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). Necessity requires more than the "'mere possibility of assistance from a requested expert'. . . ." *Gunkle,* 55 M.J. at 31 (citing *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)). A reasonable probability must be shown to exist "'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Id*. (quoting *Robinson*, 39 M.J. at 89). We apply a three-part test to determine whether expert assistance is necessary. The appellant must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop. *Bresnahan*, 62 M.J. at 143.

A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion. *Id*. (citing *Gunkle*, 55 M.J. at 32). Our superior court describes this standard as follows:

> In determining whether the military judge abused his discretion in denying the defense's request for an expert consultant, each case turns on its own facts. Neither the denial nor the grant of a request for an expert consultant . . . is necessarily grounds for reversal. But, as this Court has previously noted, "to reverse for 'an abuse of discretion involves far more than a difference in . . . opinion . . . .

Id. (internal citations omitted). We find no abuse of discretion.

Here, the appellant did not carry his burden to show why the confidential expert was necessary. The IMC demonstrated that he was able to educate himself on forensic computer analysis through informal consultation with an expert that was not assigned to the defense team. This was demonstrated through his extensive cross-examination of the Government's expert witness, using the information gathered through that informal consultation. Record at 361-63, 365-66, 369-71, 384. Although the IMC sought out an expert only after the appellant's motion for expert assistance was denied, it fully demonstrates why a designated confidential expert was not necessary. We also note

that the IMC was given full access to the Government's expert witness and his report prior to the expert's testimony.

Even if the military judge abused his discretion in denying the appellant's request, which we do not find, any error was harmless. The denial of a confidential expert did not prejudice the appellant's ability to present his case or to challenge the Government's case against him. This issue is without merit.

Admission of Rebuttal Evidence

For his fifth assignment of error, the appellant claims that the military judge committed plain error by allowing the Government to present forensic computer analysis evidence in rebuttal. Appellant's Brief at 25. The appellant did not object to the rebuttal evidence.[3]

MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), provides that error may not be based on a ruling admitting evidence absent a timely objection. Absent plain error, failure to object to the admission of evidence forfeits the issue on appeal. *United States v. Magyari*, 63 M.J. 123, , slip op. at 5 (C.A.A.F. 2006)(citing *United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001)).

To prevail under a plain error analysis, an appellant must show that: (1) "'there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Id*. (quoting *United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001)). If an appellant meets his burden of showing plain error, the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt. *Id*. (citing *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005)). We find there was error, it was plain and obvious, but no material prejudice to a substantial right resulted from that error.

The appellant's wife testified that she was with the appellant when he purchased one of the stolen computers at a flea market[4] on 11 August 1996. Record at 301. When asked to identify which of the three stolen laptop computers admitted

[3] Rather than object to the evidence, the IMC requested a continuance and access to an expert consultant. Record at 328-29. When Prosecution Exhibit 14 was offered, the IMC did not have an objection. *Id*. at 400-01.

[4] The flea market was held in the RFK Stadium parking lot in Washington, D.C., and vendors sold diverse items including electronic equipment. Record at 301.

into evidence was purchased at the flea market, the witness, although not sure, chose Prosecution Exhibit 10, a black AST Ascentia 810N laptop computer. Record at 304. The appellant's former landlord testified that she saw the appellant purchasing an "AZT or AST" brand laptop computer at a flea market in March 1998. *Id*. at 248. Two of the stolen laptops were AST brand computers. PE 5 and 10.

The Government offered rebuttal evidence that the stolen computer that "may or may not have been identified by the [appellant's wife]" was in the appellant's possession prior to the 11 August 1996 flea market. *Id*. at 328-29. That evidence consisted of expert witness testimony and the forensic analysis report of the computer's contents. PE 14. Although the appellant's wife identified the black AST Ascentia 810N laptop computer, PE 10, the Government expert conducted his analysis on the grey Zenith laptop, PE 1.

The Government's rebuttal evidence established that a program licensed to the appellant was installed on the Zenith laptop computer, PE 1, on 12 January 1996. Record at 394; PE 14. That computer, when stolen on or about 4 January 1996, contained a specialized "surface link interface card (SLIC) developed exclusively for NAVCOMTELSTA."[5] PE 12 at ¶ 5a. That same Zenith laptop computer was linked to the appellant through a stipulation of fact which established that he traded a Zenith laptop computer to a retired service member in early summer of 1996. That retiree then traded the same Zenith laptop computer to an employee of the Securities and Exchange Commission (SEC) in late summer 1996. The SEC employee discovered that the computer contained the SLIC and turned the computer over to the Naval Criminal Investigative Service. *Id*. at ¶¶ 5e and f.

The Government's "rebuttal" evidence concerning the Zenith laptop computer established little more than was already contained in the stipulation of fact -- it merely put the Zenith laptop in the appellant's hands in January 1996 rather than "early summer 1996." The laptop identified by the appellant's wife, the black AST Ascentia 810N laptop computer, could not have been purchased at the 11 August 1996 flea market as she claimed, because it was not stolen until 26 March 1998. *Id*. at ¶ 9b. It did not take forensic analysis to discover this obvious factual discrepancy.

The Government's rebuttal evidence did not rebut anything presented by the appellant during the defense case-in-chief, and

[5] Navy Computer and Telecommunications Station.

was merely cumulative with what had already been presented by the Government in its case-in-chief. The Government's request to submit this rebuttal evidence resulted in an extended recess of more than two months. This recess was completely unnecessary, not only because the fact established did not rebut anything, but because NCIS had previously conducted forensic analysis of all three laptop computers in an attempt to locate personal identifying information linking the appellant to the computers. Record at 229.

The military judge erred in admitting the Government's rebuttal evidence, that error was plain and obvious, however, it did not materially prejudice a substantial right. Because the evidence was essentially cumulative with the stipulation of fact, PE 12, the "rebuttal" evidence presented little more than what the appellant had already stipulated to. Therefore, the military judge did not abuse his discretion. Even if there was plain error, we are convinced beyond a reasonable doubt that it was harmless. This assignment of error is without merit.

Incomplete Record of Trial

For his sixth assignment of error, the appellant claims that the record of trial is not verbatim and that the missing portions are substantial omissions creating a rebuttable presumption of prejudice. Appellant's Brief at 28. We disagree.

Whether a record of trial is incomplete, is a question of law which we review *de novo*. The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)(citing *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979). Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982). Substantial omissions render a record of trial incomplete, raising a presumption of prejudice. *Id.* (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as a complete one. *Henry,* 53 M.J. at 111. Records of trial that are not substantially verbatim or are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of 6 months. R.C.M. 1103(b)(2)(B).

When there is an omission in a transcript, the concern is not with the sufficiency of the record for purpose of review, but with the statutory mandate regarding the type of record that must be made of courts-martial proceedings. *Gray*, 7 M.J. at 298 (citing *United States v. Sturdivant*, 1 M.J. 256, 257 (C.M.A. 1976)). Thus, the question is not whether there is sufficient information otherwise in the record to support appellate review, but rather whether the omission from the record contains substantial matters.

> Substantial omissions have included unrecorded sidebar conferences that involved the admission of evidence . . . argument concerning court member challenges . . . the letter of dishonor in a worthless check case which was used to show mens rea . . . a videotape showing the accused flying during Desert Shield/Storm, which was admitted during the sentencing portion of trial . . . three defense exhibits . . . Insubstantial omissions include the absence of photographic exhibits of stolen property . . . a flier given to the members . . . a court member's written question . . . and an accused's personnel record. . . .

Henry, 53 M.J. at 111 (internal citations omitted).

Here, the appellant identifies three omissions from the record. First, the appellant correctly notes that there was a recording error that prevented the transcription of part of an Article 39(a), UCMJ, session involving the discussion of the specification under Charge III. There, the military judge *sua sponte* raised the issue of whether specific evidence that conduct is prejudicial to good order and discipline must be offered, and there was discussion of a motion hearing schedule. Record at 340. We note that the Article 39(a), UCMJ, session began at 0715 and ended at 0720 and included a recess. *Id*. at 339-41. We therefore conclude that whatever may be missing must be very brief, and we conclude insubstantial. Even if it is a substantial omission, we find that any presumption of prejudice is rebutted by the record. As to the requirement to submit evidence of prejudice to good order and discipline, we note that Charge III and its specification went to the members for findings, indicating the military judge determined there was enough evidence to proceed. Our own review of the record convinces us that there was sufficient evidence to submit Charge III and its specification to the members. *See* R.C.M. 917. As to the motion schedule, we also note that the schedule was

announced at the next Article 39(a), UCMJ, session, *id*. at 342, and that the appellant did file a motion and argued reconsideration of the military judge's ruling on that motion, *id*. at 349-51. The record of trial continues to be substantially verbatim in spite of the omission, and supports a verbatim record sentence.

Second, the appellant correctly notes that his written motion for an expert consultant and the Government's response are not attached to the record as appellate exhibits. The military judge made reference to both documents, and stated that they would be marked as appellate exhibits. *Id*. at 349. Those documents are neither attached to the record nor are they assigned exhibit numbers in the record's Description of Exhibits Admitted. There is neither a description of the exhibits' content, nor findings of fact or conclusions of law entered by the military judge. It was error not to attach the motion and reply to the record as appellate exhibits, however, we do not find that to be a substantial omission. Even if it was a substantial omission, we find that any presumption of prejudice is rebutted by the record. We note that the IMC requested the military judge to reconsider his denial of the motion. That oral request was argued on the record. *Id*. at 349-51. That argument contains sufficient information for this court to understand the appellant's position, the Government's position, and the basis for the military judge's denial of the motion. The record of trial continues to be substantially verbatim in spite of the omission, and supports a verbatim record sentence.

Third, the appellant correctly notes that a recording error resulted in the loss of portions of an Article 39(a), UCMJ, session during which there was discussion of whether a machete is a dangerous weapon, discussion of instructions on findings, and after the members returned, the beginning of the Government's closing argument. *Id*. at 408-10. As to the discussion of whether the machete is a dangerous weapon, we find there is no substantial omission.

We note that the last portion of the discussion regarding the machete was saved by using a machine to speed up the audio tape so the discussion could be transcribed. *Id*. at 408-09. Even if some of the discussion was lost and somehow a substantial omission, we find that any presumption of prejudice is rebutted by the record. While the transcriber notes that the transcript is not verbatim for that small section, we are able to understand the appellant's position and the Government's position on the issue of whether a machete is a dangerous

weapon. Charge I and its specification went to the members, who were correctly instructed that whether a machete is a dangerous weapon is a fact question for them to decide. The record of trial continues to be substantially verbatim in spite of the omission, and supports a verbatim record sentence.

Fourth, as to the discussion of instructions, the appellant correctly observes that, due to the omission of that discussion, we do not know if the appellant objected to any instructions or requested an instruction that was denied. The discussion of instructions could contain defense objections required to preserve an issue for appeal, or the request for an instruction that if not given would create prejudicial error. For that reason, we find that the omission of that discussion is a substantial omission, creating a presumption of prejudice. That presumption, however, is rebutted by the record.

We have reviewed the instructions given, and do not find any instructional error. Record at 421-31. We also note that the appellant has not claimed, either by personal declaration or by declaration of his IMC, that there were objections to instructions or instructions requested and denied, that are not part of the record. Nor does the appellant claim there was instructional error. Therefore, we will not speculate that the appellant took certain action that is not reflected in the record. We are satisfied that the appellant has not suffered any prejudice from this omission. The record of trial continues to be substantially verbatim in spite of the omission, and supports a verbatim record sentence.

Authentication of the Record

In his seventh assignment of error, the appellant asks this court to set aside the findings and sentence because the trial counsel authenticated the record of trial without proper explanation of the military judge's absence. Appellant's Brief at 32. We decline to grant the requested relief.

"The record of trial is 'the very heart of the criminal proceedings and the single essential element to meaningful appellate review.'" *United States v. Robinson*, 24 M.J. 649, 654 (N.M.C.M.R. 1987)(quoting *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977)). We analyze an authentication issue in terms of whether the act of authentication fulfills the underlying purpose of Article 54(a), UCMJ. *United States v. Galaviz*, 46 M.J. 548, 550 (N.M.Ct.Crim.App. 1997). The purpose of the Article 54(a), UCMJ, provision is to "provide a preferred order

of authentication which will guarantee 'absolute verity' to the record of trial." *Id*. (quoting *Credit*, 4 M.J. at 119). The preference for authentication by the presiding military judge is based on "the perception that authentication by the military judge eliminates any appearance of impropriety, because of the military judge's presumed neutrality." *Id*. (citing *United States v. Cruz-Rijos*, 1 M.J. 429, 431 (C.M.A. 1976)).

Substitute authentication of the record by trial counsel is authorized by R.C.M. 1104(a)(2)(B) when the military judge is dead, disabled, or absent. If the military judge was absent, as envisioned by the rule, it was proper for the trial counsel to authenticate the record. The discussion to R.C.M. 1104(a)(2)(B), however, states that "[s]ubstitute authentication is authorized only in emergencies. A brief, temporary absence of the military judge from the situs of the preparation of the record of trial does not justify a substitute authentication." An explanation for trial counsel's substitute authentication should have been attached to the record, explaining in some detail, why she was authenticating the record. R.C.M. 1103(b)(3)(E); *Galaviz*, 46 M.J. at 550. On 12 June 2000, the trial counsel authenticated the record of trial "because of the absence of the military judge." Record at 465.

The eight word explanation provided by the trial counsel in this case does not provide sufficient information upon which to determine whether substitute authentication was appropriate or not. From the record we have before us, we do not know why the military judge was absent or how long he would be absent, necessitating a substitute authentication. The military judge could have been returning the day after the trial counsel authenticated the record. Absent the required information, we conclude that it was error for the trial counsel to perform a substitute authentication. We must test for prejudice. *See United States v. Merz*, 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999).

We do not find material prejudice to the appellant's substantial rights. R.C.M. 1103(i)(1)(A) requires the trial counsel, prior to authentication of the record, to examine the record for accuracy and to make such corrections as are necessary to show the true proceedings. Defense counsel is also permitted to examine the record and to suggest to the trial counsel appropriate changes to make the record accurate, and may "forward for attachment to the record under Article 38(c), [UCMJ] any objections to the record, or bring any suggestions for correction of the record to the attention of the person who authenticates the record." R.C.M. 1103(i)(1)(B), Discussion.

Thus, although trial counsel has the greater responsibility for ensuring the accurate preparation of the record prior to authentication, defense counsel has more than a passive role in the creation of an accurate record.

On 21 April 2000, a court reporter signed the record stating the defense counsel had been provided a copy of the record of trial. Record at 465. On 23 May 2000, the trial counsel signed the record stating that she had examined the record and "had made all necessary corrections . . . ." *Id*. Neither the IMC nor the post-trial civilian counsel in this case submitted an Article 38(c), UCMJ, brief nor did they raise any legal issues concerning the record's accuracy in their clemency matters submitted under R.C.M. 1105.

This court has found harmless error, and declined to order the record of trial returned for a certificate of correction or a new authentication, when there is no claim that the record is inaccurate. *Merz*, 50 M.J. at 853-854; *see United States v. Ayers*, 54 M.J. 85, 92 (C.A.A.F. 2000). Unlike *Merz* and *Ayres*, however, the appellant has challenged the verbatim nature of the transcription and record assembly before this court, although not the accuracy of the information that is in the record. Further, unlike the trial counsel in *Ayers*, who submitted four pages of corrections to the court reporter, we have no evidence of any corrections being recommended by the trial counsel to the court reporter. *See Ayers*, 54 M.J. at 92.

The potential prejudice from a less than accurate record of trial is that the appellant could be denied a full review of his convictions, or a review based on information contained in the record that is inaccurate. We do not believe, however, that these conditions exist. First, we have previously determined that the record is substantially verbatim, except for the discussion of instructions on findings, and determined that the appellant has not suffered any prejudice from any ommission. Second, the IMC was provided an opportunity to comment on any corrections he felt necessary to make the record accurate prior to authentication. Third, the appellant did not raise any legal issue concerning the record's accuracy prior to the CA taking his action. Fourth, there are no allegations that what is in the record is inaccurate. Based on this, we are confident that the record is accurate and that the appellant can receive a full and fair review of his convictions based on the completeness and accuracy of the current record of trial. Art. 66(c), UCMJ.

We do not condone the sloppy preparation of this record of trial, or the trial counsel's failure to follow the authentication protocol. However, we find that the trial counsel's failure to provide a full description of the military judge's absence that necessitated substitute authentication of the record did not materially prejudice the substantial rights of the appellant. Art. 59(a), UCMJ. This issue is without merit.

Member Misconduct

For his ninth assignment of error, the appellant asserts, for the first time on appeal, that a member who sat on his court-martial panel committed misconduct. Appellant's Brief at 40; Appellant's Declaration of 14 May 2003 at ¶ 3.[6] We disagree.

By post-trial declaration, the appellant asserts that Chief Sonar Technician (Surface) L (STGC L) committed misconduct in two respects: (1) she falsely stated during *voir dire* that she did not know the appellant; and, (2) that the same member had third-party contact with the CA's staff judge advocate (SJA) during a recess in his trial. We will address each allegation and resolve the issue by applying our superior court's analysis expressed in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

During *voir dire*, the military judge asked generally "does anyone know the accused, Petty Officer Allende?" He received negative responses from all members. Record at 124. Although STGC L was called back for individual *voir dire*, no questions were asked concerning prior contact with the appellant. *Id*. at 158-61. The appellant now asserts that STGC L's response was false, because he met her four years earlier in 1995 during a base indoctrination class. We note that the military judge's *voir dire* question asked whether any member "knew" the appellant. Assuming the only personal contact between the appellant and STGC L was four years earlier, as alleged by the appellant, we do not find anything inconsistent between the member's response and that single contact.

The appellant also asserts that he personally observed STGC L speaking to the CA's SJA during a recess in his court-martial. When STGC L and the SJA saw the appellant, they separated. The

[6] We have considered the appellant's eighth assignment of error claiming the military judge erred by not giving a limiting instruction and a spillover instruction. We reject this assignment of error because the military judge, under the circumstances of this case, was not obligated to give a limiting instruction, and because he did give a spill over instruction. Record at 428.

appellant claims that he then had personal contact with STGC L to question her about what he saw, and that she told him that it was none of his business. If contact occurs between a court member and a third party, including with the appellant, concerning the court-martial, it is presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *United States v. Hamilton*, 41 M.J. 22, 26 (C.M.A. 1994). The appellant, however, speculates that the contact he observed between STGC L and the SJA was about him.

The military judge instructed the members that they could not discuss the appellant's case with anyone during a recess or adjournment, and if anyone tried to discuss the case with them, the member was to notify the military judge. Record at 168. We presume that the members follow the instructions of the military judge, and we will not speculate otherwise. *See, e.g.*, *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

In *Ginn*, 47 M.J. at 248, our superior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims. We believe the appellant's claims can be disposed of under the first, second and fourth principles. Under the first principle, even if the allegation concerning contact between STGC L and the SJA was true, it would not result in relief, because under the second principle the appellant merely speculates that this contact was about him. Because the military judge instructed the members to report such contacts, and because there was no reporting of contact by STGC L or by the appellant, under the fourth principle we find that the record as a whole compellingly demonstrates the improbability of the appellant's alleged facts. This assignment of error is without merit.[7]

Post-Trial Delay

Although not raised as an assignment of error, we note that the appellant was sentenced on 22 September 1999, the CA took his action on 9 November 2000, the case was docketed with this court on 13 December 2000, briefed by appellate defense counsel on 7 July 2003, briefed by the Government on 8 June 2004, and the appellant's reply was filed on 6 July 2004. The record has been before this court for almost two years after briefing, waiting for resolution. We find this total post-trial delay to

[7] We have reviewed the appellant's tenth assignment of error concerning the failure to put on "seven or so" character witnesses and find it to be without merit. The appellant called seven witnesses, six of whom provided character evidence.

be facially unreasonable. After consideration of the factors enumerated in *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005), however, we do not find a due process violation. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey v. United States*, 60 M.J. 100, 103 (C.A.A.F. 2004); *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). Considering the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc), we believe the extreme amount of time that the appellant's case has languished in post-trial review demands sentencing relief. We will take action in our decretal paragraph.

Conclusion

Accordingly, we affirm the findings of guilty and only that portion of the sentence as extends to a bad-conduct discharge, confinement for nine months, and reduction to pay grade E-1. We specifically disapprove three months of confinement and all forfeitures.

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court