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

**BEFORE**

**Charles Wm. DORMAN** **C.A. PRICE** **J.D. HARTY**

**UNITED STATES**

**v.**

**Nathan T. OTTO**
**Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200001460 Decided 26 September 2005

Sentence adjudged 26 August 1999. Military Judge: J.F. Havranek. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

Maj CHARLES HALE, USMC, Appellate Defense Counsel
LtCol ERIC STONE, USMC, Appellate Defense Counsel
Maj C ZELNIS, USMC, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel



HARTY, Judge:

In accordance with his pleas, the appellant was convicted by a general court-martial composed of a military judge alone of conspiracy to possess and distribute methamphetamine, unauthorized absence (two specifications), escape from confinement, wrongful use and distribution of methamphetamine, communicating a threat to a witness to influence testimony (two specifications), and solicitation to commit murder, in violation of Articles 81, 86, 95, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 895, 912a, and 934. The military judge sentenced the appellant to 35 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, a $30,000 fine or an additional 5 years of confinement if the fine is not paid, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 240 months for 10 months from the date of the action.

This is the second review by this court. Previously, another panel affirmed the findings and part of the sentence. *United States v. Otto*, No. 200001470, unpublished op. (N.M.Ct.Crim.App. 29 Apr 2003). On review, our superior court set aside this court's decision in light of *United States v. Jenkins,* 60 M.J. 27 (C.A.A.F. 2004), and ordered a new review before a panel of judges who had not participated before. *United States v. Otto,* 60 M.J. 346 (C.A.A.F. 2004)(summary disposition).

In accordance with that order, this court has carefully examined the entire record of trial, the appellant's 6 assignments of error, the appellant's motion to attach documents, the Government's answer, and the appellant's motion to cite supplemental authority. We find merit in the appellant's second assignment of error, and we will set aside the enforcement provision of the fine in our decretal paragraph. Following our corrective action, we find that no errors materially prejudicial to the appellant's substantial rights remain. Arts. 59(a) and 66(c), UCMJ.

**Pretrial Agreement Provision Violates Public Policy**

For his first assignment of error, the appellant asserts that a provision of his pretrial agreement violates public policy, because it required him to withdraw all motions pending before the court. The appellant avers that this court should set aside all findings of guilt and the sentence. We disagree.

Paragraph 15 of the pretrial agreement reads "I agree to withdraw any motions presently before the court." Appellate Exhibit X at 8. Seven defense motions were pending when the pretrial agreement was signed. AE I - VI, and XIII. Appellate Exhibit XIII is a motion to suppress the appellant's communications with a cooperative witness who was working with the Naval Criminal Investigative Service (NCIS) while the appellant was represented by civilian counsel on civilian drug charges pending in Indiana. The appellant's written communications with the NCIS witness were used to obtain a search warrant that produced further evidence against the appellant.

The appellant refers to his motion to suppress as a "right to counsel motion." Appellant's Brief and Assignment of Error of 27 Jun 2002 at 5. He further asserts that the pretrial agreement is unenforceable if it "deprives the defendant of counsel." *Id.* RULE FOR COURTS-MARTIAL 705(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) states:

> A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: *the right to counsel*; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

(Emphasis added). The motion referred to in the appellant's assignments of error is a motion to suppress evidence. A motion to suppress evidence is a waivable motion and a permissible term for a pretrial agreement. *United States v. McKenzie,* 39 M.J. 946, 949 n.3 (N.M.C.M.R. 1994); MIL. R. EVID. 304(d)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). The agreement to withdraw motions has nothing to do with asserting a right to counsel or waiving a right to counsel. We categorically reject the appellant's attempt to squeeze a square peg into a round hole. The appellant was represented by two competent counsel throughout his trial, and he stated that he was very satisfied with their representation. Based on our review of the record, the appellant was provided his constitutional right of counsel at his court-martial.

Generally, an accused and a CA are free to negotiate and enter into pretrial agreements. *United States v. Cassity,* 36 M.J. 759, 760 (N.M.C.M.R. 1992); *see* R.C.M. 705. "Either the defense or the Government . . . may propose any 'term or condition not prohibited by law or public policy.'" *United States v. Rivera,* 46 M.J. 52, 53 (C.A.A.F. 1997)(quoting R.C.M. 705(d)(1)). "[A] provision which, in effect, would deny the accused a fair hearing would be invalid" and provisions are prohibited if they "tend to undermine the integrity of the court-martial process." *United States v. McKenzie,* 39 M.J. 946, 949 (N.M.C.M.R. 1994). The pretrial agreement provision complained of here did not deny the appellant a fair hearing nor was the integrity of the court-martial process undermined by the withdrawal of any of the appellant's pending motions. Paragraph 15 of the pretrial agreement is, therefore, enforceable. This issue has no merit.

**Fine Enforcement Provision**

The appellant's second and third assignments of error deal with the fine enforcement provision contained in his sentence. The appellant asserts that the CA erred in approving the fine enforcement provision of the sentence because it results in total confinement exceeding the negotiated cap of 240 months. The appellant also asserts that if the fine enforcement provision is approved, he was "induced into pleading guilty by an honest and substantial misunderstanding as to a material term in the pretrial agreement." Appellant's Brief at 10. The appellant requests this Court set aside both the fine and the fine enforcement provision or set aside the findings and sentence. We agree in part with these arguments.

As part of his sentence, the military judge imposed a $30,000 fine plus an additional 5 years of confinement if the fine is not paid. Record at 172. The military judge concluded and the

appellant agreed that the CA was free to approve the fine and its enforcement provision. Record at 173. The military judge, however, did not discuss whether the CA was obligated to suspend the fine enforcement provision under the terms of the agreement.

The staff judge advocate (SJA) advised the CA that the "pretrial agreement provides that all confinement in excess of 240 months will be suspended," however, he did not address the CA's obligation as to the fine enforcement provision. Staff Judge Advocate's Recommendation (SJAR) of 21 Jun 2000 at 4. In taking his action, the CA followed the SJA's advice and approved the sentence but suspended confinement in excess of 240 months. There is no reference to the fine enforcement provision in the CA's action.

The CA's action is clear and unambiguous in that the CA approved the sentence as adjudged and suspended confinement in excess of 240 months. The ambiguity results from a failure to address the fine enforcement provision. We cannot tell from the CA's action whether the negotiated 240 month confinement cap can or cannot be exceeded through the imposition of the fine enforcement provision. *See United States v. Hodges*, 22 M.J. 260 (C.M.A. 1986)(holding that a negotiated confinement ceiling may not be exceeded through the exercise of commutation powers absent the accused's waiver).

We hold that the fine enforcement provision of the sentence cannot be enforced because the CA's action is ambiguous as to whether that provision was approved or not. That ambiguity will be resolved in the appellant's favor. We further find that the fine enforcement provision of the sentence cannot be enforced because there is no indication the appellant has waived the negotiated 240-month confinement cap. In addition, the record of trial does not adequately reflect the appellant's understanding of the fine enforcement provision as it relates to the limitation on his confinement. Under these circumstances, we believe that the appropriate remedy is to disapprove the enforcement provision. *See United States v. Walker,* 26 M.J. 813, 815 (A.C.M.R. 1988)(disapproving an enforcement provision where the record did not indicate that the appellant understood that the CA could approve an enforcement provision which would extend the agreed upon limitation of confinement). By disapproving the fine enforcement provision, the appellant retains the benefit of his bargain and his pleas remain provident. We will take corrective action in our decretal paragraph.[1]

**Sentence Appropriateness**

For his fourth assignment of error, the appellant asserts that his sentence is inappropriately severe. The appellant

[1] This corrective action renders moot the appellant's third assignment of error concerning providence of pleas based on a misunderstanding of a material provision of the pretrial agreement.

claims an appropriate remedy would be the disapproval of the fine and confinement in excess of 15 years. We disagree.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the CA. We are, however, compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *see* R.C.M. 1107(b). Taking into account all the facts and circumstances of this case, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we conclude the appellant's sentence is appropriate.

The appellant's crimes include escaping from pretrial confinement, threatening witnesses, engaging in an extensive criminal drug enterprise, and soliciting another to commit murder. These are serious criminal acts that justify a serious sentence. As such, we decline to grant the requested relief.

**Post-Trial Processing Delay**

For his fifth assignment of error, the appellant asserts that he was denied speedy post-trial review. The appellant avers that this court should exercise its power under Article 66, UCMJ, and set aside the fine. We disagree.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, 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 (C.A.A.F. 2000)). 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).

The appellant's case involves multiple guilty pleas and sentencing on 26 August 1999, resulting in a 175-page record of trial that was prepared for authentication on 24 April 2000 and finally authenticated on 16 May 2000. There is no Government explanation for the 8-month delay between sentencing and authentication. We find that the unexplained delay alone is

facially unreasonable, triggering a due process review. Since there is no explanation for the delay in the record, we look to the third and fourth *Jones* factors. We do not find an assertion of the right to a timely appeal by the appellant, nor do we find any claim or evidence of prejudice to the appellant. While we do not condone the unexplained delay in this case, we conclude that there has been no due process violation resulting from the post-trial delay.

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).

**Law Library Access**

In the appellant's sixth assignment of error, he asserts that he was denied access to a law library during his incarceration at the Marine Corps Air Station, Miramar and Marine Corps Base, Camp Pendleton brigs. As a result of these violations, the appellant asserts that this court should set aside the confinement in excess of 15 years and the fine. We disagree.

Every accused has a constitutional right of access to the courts. *Bounds v. Smith,* 430 U.S. 817, 821 (1977). Access to an adequate law library is not the only way to assure that right. An accused provided with legal representation has access to the courts, *Id.* at 830-31, as long as that representation does not hinder the accused's efforts to pursue a legal claim. *Lewis v. Casey,* 518 U.S. 343, 351, 356 (1996).

Here, the appellant argues that he was denied access to the courts, because the brigs failed to supply an adequate law library. Appellant's Brief at 15-17. The appellant claims that if he had access to an adequate law library, he could have researched and raised the first three assignments of error in the post-trial phase. We reject this argument.

Throughout his court-martial process the appellant was provided legal representation. Record at 7-8; Clemency Request of 5 Jul 2000. At every stage of appellate review, the appellant has been provided legal representation through appellate defense counsel. Art. 70, UCMJ. Even if the appellant exhausts his appellate remedies all the way through the United States Supreme Court, he retains appellate defense counsel to assist in preparation of any additional issues he wishes to raise before this court or any of our superior courts. Art. 70, UCMJ; *see also United States v. Grostefon,* 12 M.J. 431, 436-37 (C.M.A. 1982). The appellant does not suggest that the representation he

received has in any way hindered his access to the courts or his ability to assert any legal claim. This issue has no merit.

The appellant claims that the Camp Pendleton Brig was "unhealthy" and that access to a law library would have enabled him to raise this issue at his trial. Appellant's Brief at 17. The appellant does not explain why he did not have his detailed defense counsel raise the "unhealthy brig condition" issue at trial.

Not having access to a law library did not prevent the appellant from raising any pretrial confinement issues. The appellant's trial defense counsel could have presented this issue to the military judge in the form of a motion for appropriate relief. There is no basis to believe the appellant's ability to assert this issue at court-martial was hindered by a lack of access to a brig law library.

Finally, appellate defense counsel's attempt to invoke *United States v. Lynn*, 54 M.J. 202, 207 n.11 (C.A.A.F. 2000), as support for the appellant's position on this issue falls short. While our superior court recognized that the Navy-Marine Corps Appellate Defense Division was understaffed, it did not find that the appellate defense counsel assigned to that case had been rendered incompetent to proceed in this matter. To the contrary, we find nothing in the record to suggest appellate defense counsel was in any way hindered in his ability to adequately represent the appellant. This issue is without merit.

**Conclusion**

Accordingly, we affirm the findings and only so much of the sentence as provides for reduction to pay grade E-1, forfeiture of all pay and allowances, a $30,000.00 fine, 35 years confinement, and a dishonorable discharge.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court