

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
R.E. VINCENT, V.S. COUCH, R.G. KELLY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**STEVEN W. EDWARDS  
MACHINIST'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200602314  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 22 February 2006.

**Military Judge:** CDR John Maksym, JAGC, USN.

**Convening Authority:** Commander, U.S. Naval Forces, Naval Base, Guam.

**Staff Judge Advocate's Recommendation:** LCDR K.E. Grunawalt, JAGC, USN.

**For Appellant:** LCDR Rebecca Snyder, JAGC, USN.

**For Appellee:** LCDR Paul Bunge, JAGC, USN.

**14 April 2009**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

VINCENT, Senior Judge:

This case is before us for a second time. A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of carnal knowledge, sodomy with a child under the age of 16, and possession of child pornography, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced to confinement for 15 years, reduction to pay grade E-1, a \$10,000.00 fine, and a dishonorable discharge.

In his initial pleading, the appellant raised four assignments of error.<sup>1</sup> On 18 September 2007, we addressed the appellant's fourth assignment of error and returned the record to the Judge Advocate General of the Navy for remand to the convening authority (CA) for a new force judge advocate's recommendation (FJAR) and CA's action. *United States v. Edwards*, No. 200602314, 2007 CCA LEXIS 350, unpublished op. (N.M.Ct.Crim.App. 18 Sep 2007).

Specifically, we evaluated the inclusion of an 11-year-old, dismissed nonjudicial punishment (NJP), similar in nature to some of the charges to which the appellant pled guilty, in the "Record of prior [NJP] punishment" section of the 10 August 2006 FJAR. We held that the reference to a 1995 dismissed NJP under RULE FOR COURTS-MARTIAL 1106(d)(3)(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) was an error materially prejudicial to the appellant's substantial right to have his clemency requests judged by the CA based an accurate depiction of his service record.

The appellant's case is again before us. He now raises three supplemental assignments of error, the first two of which are similar to some of his earlier assignments of error: (1) the Government violated the terms of his pretrial agreement by failing to provide automatic forfeitures to his two minor dependents; (2) the FJA committed prejudicial error by referencing a dismissed nonjudicial punishment in his recommendation to the CA, and failing to comment on the legal error raised by the trial defense counsel in his R.C.M. 1105 submission; and (3) the Government violated his due process right to speedy post-trial review by creating unreasonable delay through careless post-trial processing.

We have examined the record of trial, the appellant's initial and supplemental assignments of error, and the Government's responses. We find merit in the appellant's second supplemental assignment of error and will take corrective action in our decretal paragraph.

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<sup>1</sup> I - Whether this court should order MM1 Edwards to be released from confinement and forfeitures paid to him because the convening authority did not approve the sentence to confinement or automatic forfeitures.

II - Whether the Government denied MM1 Edwards' the benefit of the bargain where the Government did not pay automatic forfeitures consisting of all pay and allowances to MM1 Edwards' two minor dependents in violation of a negotiated provision in the pre-trial [sic] agreement.

III - Whether the \$10,000 fine is inappropriately severe given the non-monetary nature of the offenses, the military judge's recommendation that the fine be suspended, and the character of MM1 Edwards' service.

IV - Whether the force judge advocate committed prejudicial error by not responding to the trial defense counsel's contention that the force judge advocate's recommendation to the convening authority incorrectly states that MM1 Edwards received nonjudicial punishment on 2 November 2005.

## **Error in the Force Judge Advocate's Recommendation**

The latest FJAR states that the appellant has no record of prior NJP. See FJAR of 20 Nov 2007<sup>2</sup> at 1(d)(5). However, the "Optional Matters" section of the FJAR contains the following language: "CO's NJP held on 2 November 1995, for Violation of UCMJ, Article 134, Indecent acts or liberties with a child, on or about January or April 1994. Charge was dismissed with a warning." *Id.* at 1(e). Additionally, the FJAR also references this dismissed NJP in the "Post-trial Matters" section in which he discussed the holding of our earlier opinion. *Id.* at 1(j).

In both his 11 December 2007 clemency request and on appeal, the appellant raised the inclusion of the dismissed NJP in the FJAR as legal error. We note, with considerable dismay, that the FJA did not respond to the allegation of legal error as prescribed under R.C.M. 1106(d)(4),<sup>3</sup> and on 24 June 2008, the CA took action on the appellant's case.<sup>4</sup>

We again remind the FJA that if an accused raises an allegation of legal error before the CA has acted on his case, he has an additional responsibility to advise the CA if "corrective action on the findings or sentence should be taken . . . . The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required." R.C.M. 1106(d)(4); see *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988).

In *Hill*, the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held that, "in most instances, failure of the staff judge advocate . . . to prepare a recommendation with the contents required by R.C.M. 1106(d) will be prejudicial and will require remand of the record to the convening authority for preparation of a suitable recommendation." 27 M.J. at 296. However, the court also held that Courts of Criminal Appeals are "free to affirm when a defense allegation of legal error would not foreseeably have led to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority." *Id.* at 297.

Initially, we must decide if the FJA's inclusion of the 1995 dismissed NJP in his recommendation as an additional matter, rather than a prior NJP, constitutes error. A staff judge advocate (SJA) may include "any additional matters deemed

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<sup>2</sup> We note the FJAR is actually dated 20 November 2006. However, it appears to be a scrivener's error since we remanded the case for new post-trial processing on 18 September 2007.

<sup>3</sup> The FJA also failed to adhere to the requirements of R.C.M. 1106(d)(4) in his 10 August 2006 FJAR.

<sup>4</sup> The officer who took action on 24 June 2008 was not the same officer who had taken the initial action on 13 September 2006.

appropriate by the [SJA]", including matters outside the record of trial. R.C.M. 1106(d)(5). However, "[t]he SJA cannot present to the convening authority information which he knows to be unreliable or misleading." *United States v. Mann*, 22 M.J. 279, 280 n.2 (C.M.A. 1986)(citations omitted).

In order to determine if the FJA has presented reliable information regarding the 1995 dismissed NJP, we have reviewed the record of trial and applicable service regulations. The FJA does not provide any supporting documentation or information regarding this matter in either his original or subsequent recommendation. The record of trial also does not contain any supporting documentation. In fact, other than the FJAR, the only other references to this matter are contained in the appellant's pretrial Motion In Limine, Appellate Exhibit IX,<sup>5</sup> and his trial defense counsel's 11 December 2007 clemency request. Both documents reference a 1994-95 Naval Criminal Investigative Service (NCIS) investigation of the appellant for alleged indecent liberties with a child. These documents also indicate that a supplemental NCIS investigation was done in November 1995 and indicates that the charges were dismissed at NJP.

We are not surprised by the lack of supporting documentation. Article 1626-020 of the Naval Military Personnel Manual (MILPERSMAN), (CH-11, 13 Apr 05), requires the following action for NJPs that are either dismissed, or dismissed with a warning: "No service record entries required or authorized." Additionally, if an NJP authority "does not conclude that the servicemember committed the offenses alleged, [he] shall inform the servicemember and terminate the proceedings." MCM, Part V, ¶ 4c(4)(A).

Accordingly, we conclude that the FJA erred by including unreliable information, i.e., the dismissed NJP, in his 20 November 2007 recommendation. Moreover, this information serves no purpose other than to wrongfully imply to the CA that the appellant is a repeat offender.

Having found error, the following process is prescribed for "resolving claims of error connected with [a CA's] post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). The appellant raised the legal error in both his 11 December 2007 clemency request and in his supplemental pleading and contends in both documents that the FJA's error has prejudiced his

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<sup>5</sup> Appellate Exhibit IX was the appellant's pretrial Motion In Limine to prevent the Government from offering any evidence of a 1995 NCIS investigation of the appellant regarding an alleged indecent touching of a minor. This issue was not litigated at trial since the appellant withdrew all pretrial motions. Record at 22.

opportunity to obtain clemency. Finally, the appellant attempted to resolve the error when he was provided the opportunity to do so by raising the legal error in his latest clemency request.

Since clemency is a highly discretionary Executive function, and the appellant has met the threshold requirements set forth above, we must determine if the error in the FJAR "resulted in material prejudice to [the appellant's] substantial right to have a request for clemency judged on the basis of an accurate record." *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003). The appellant is considered to have suffered a material prejudice to his substantial rights "if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Wheelus*, 49 M.J. at 289 (quoting *United States v. Chatham*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)).

We find that the FJA's persistent inclusion of an unsupported 1995 dismissed NJP in his recommendation is unnecessary and misleading. Additionally, it constitutes an error materially prejudicial to the appellant's substantial right to have his clemency request for a reduction in confinement judged by the CA based upon an accurate depiction of his service record.

This was particularly so in the appellant's case as the CA, in his 24 June 2008 action, states that he did not have the benefit of reviewing the appellant's service record before considering the appellant's clemency request and taking his action. Therefore, the CA's reliance upon the accuracy of the FJAR's recommendation and advice was critically important.

### **Conclusion**

Accordingly, the CA's action is set aside and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate CA.

Additionally, we note that, in his 24 June 2008 action, the CA, pursuant to a pretrial agreement, suspended confinement in excess of 10 years for a period of 12 months from the date of trial and deferred and waived all automatic forfeitures. Furthermore, the CA disapproved the portion of the sentence extending to the \$10,000.00 fine. Therefore, in taking subsequent action, the CA cannot take any action on the sentence that is less favorable to the appellant than that taken in his 24 June 2008 action.

Finally, we note that initial assignment of error II and supplemental assignment of error I allege that the Government violated the terms of the appellant's pretrial agreement by failing to provide automatic forfeitures to his two minor dependent children. In its 29 December 2008 Answer, the Government agrees that the appellant is entitled to the benefit of his bargain and indicates that Appellate Government Counsel

has consulted with Personnel Support Detachment San Diego and ascertained that the appellant's dependents are entitled to an additional \$6,272.16.

After proper post-trial processing in accordance with R.C.M. 1105-1107, the record shall be returned to this court for completion of appellate review. Upon its return, we expect the Government to provide documentation to verify that the appellant's dependents have been provided the monetary allotment due to them.

Senior Judge COUCH and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court