

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

**Before
D.O. VOLLENWEIDER, J.E. STOLASZ, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TYRICE L. HAYES
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600910
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 February 2005.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, Marine Corps
Base, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col W.D. DURRETT,
Jr., USMC.
For Appellant: LCDR Derek Hampton, JAGC, USN.
For Appellee: Maj Wilbur Lee, USMC.

25 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

The appellant was convicted by a military judge sitting as a special court-martial, pursuant to his plea, of indecent acts in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The appellant's pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's five assignments of error,¹ and the Government's response. 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.

Facts

On 12 September 2004, following a night of drinking, Corporal (Cpl) B returned to his barracks room at approximately 0230 in an intoxicated state. Cpl B's roommate, Cpl D.S. Coughman, was already asleep in the other bunk. The appellant entered the barracks room of Cpl B shortly thereafter. At some point, during those early morning hours, Cpl B woke up with his bed sheet covering his face. He felt the sensation that he was being orally sodomized, but was paralyzed as if in a state of shock. He then felt his penis being removed from the mouth of the individual sodomizing him, and inserted into the perpetrator's anus. A noise outside the room startled the perpetrator, at which time Cpl B lifted the sheet from his face and identified the appellant as the person who was sexually assaulting him. Cpl B chased the appellant out of his room and down the hall, but was unable to catch him. Cpl B's chase was ended by a senior enlisted Marine who took charge of the situation and directed him to undergo a medical examination similar to those conducted on rape victims.

The appellant was initially charged with forcible sodomy, but entered into a pretrial agreement in which he agreed to plead guilty to the lesser included offense of committing an indecent act with Cpl B in return for the convening authority referring the case to a special court-martial. The appellant also agreed to enter into a stipulation of fact pursuant to the terms of the pretrial agreement.

¹ I. Appellant was denied his right to a fair trial when the military judge exhibited partiality, advised the Government on trial tactics, and failed to *sua sponte* disqualify himself from this case.

II. The convening authority materially breached the terms of the pretrial agreement by submitting evidence that contradicted the stipulation of fact.

III. Appellant was denied his Sixth Amendment right to the effective assistance of counsel.

IV. The sentence, consisting of confinement for twelve (12) months, reduction to E-1, and a bad conduct (sic) discharge, is inappropriately severe given the circumstances.

V. Whether the unreasonable post-trial delay in the post-trial processing of this case materially prejudiced appellant's substantial right to speedy post-trial review, as well as affects the sentence this court should approve.

Impartiality of the Military Judge

The appellant's first assignment of error asserts that the military judge abandoned his role of impartiality by: (1) advising the trial counsel on trial tactics and advocating for the Government regarding the use of the stipulation of fact; and (2) exhibiting personal bias and prejudice against the appellant specifically, and homosexuals in the military in general, by allegedly making inappropriate comments during a post-trial debriefing session. The appellant claims that the military judge should have disqualified himself, and that his failure to do so denied the appellant of his right to receive a fair trial.

Law

The Rules for Courts-Martial provide that a military judge shall disqualify himself if the military judge's impartiality might reasonably be questioned. A specific ground for disqualification includes personal bias or prejudice concerning a party. RULES FOR COURTS-MARTIAL, 902(a) and 902(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). A military judge's impartiality is crucial to the conduct of a legal and fair court-martial. *United States v. Quintanilla*, 56 M.J. 37, 43 (C.A.A.F. 2001). There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings. *Id.* at 44. "When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of the trial, [the] court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *Id.* at 78 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). This test is applied from the viewpoint of a reasonable person observing the proceedings. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007). Failure to object at trial to alleged partisan action on the part of the military judge may present an inference that the defense believed the military judge remained impartial. *Id.*

First, we will analyze the defense claim that the military judge became an advocate for the Government by advising on trial tactics. Second, we will analyze the defense assertion of bias and prejudice.

The military judge informed the counsel at an R.C.M. 802(b) conference that he had received a briefing from the prior judge sitting on the case, and had been advised that the case involved an allegation of forcible sodomy. Record at 7. During the R.C.M. 802 conference, the military judge expressed concern that the portion of the stipulation of fact describing the indecent act between the appellant and Cpl B could be contradicted if Cpl B testified during sentencing that he was forcibly sodomized. The military judge initially advised counsel that he would not be able to consider Cpl B's victim's impact testimony if it contradicted the stipulation. *Id.*

The portion of the stipulation describing the indecent act provided:

In the early morning hours of 12 September 2004, I was in Corporal [B's] room. I began to fondle [Cpl B] through his PT shorts. I then placed my hand on his penis and massaged it until it became erect. He eventually ejaculated.

Appellate Exhibit I at 1.

During an Article 39(a), UCMJ, session, the trial counsel explained that Cpl B would testify during sentencing that his penis was massaged by the appellant, followed by the appellant performing oral sodomy on him and then attempting to insert Cpl B's penis inside of his anus. He further stated that Cpl B would testify regarding the impact this incident had on him. Record at 9. The trial counsel argued that the stipulation was written ambiguously to prevent a contradiction with Cpl B's sentencing testimony.

The defense contended that testimony of forcible sodomy would directly contradict R.C.M. 1001(b)(4).² The defense counsel argued that the appellant was pleading guilty to an indecent act as described in the stipulation, and noted that the convening authority agreed pursuant to the terms of the pretrial agreement not to go forward on the forcible sodomy offense. Record at 8, 9.

The military judge's concern stemmed from the substantive content of the stipulation describing the indecent act as the appellant fondling Cpl B's penis outside of his shorts until he became erect and ejaculated. The sentencing testimony of Corporal B would, presumably, describe an incident in which his shorts were pulled down prior to him being orally sodomized, and then mounted with his penis being placed in the assailant's anus. In short, the military judge believed the victim impact testimony offered by Cpl B would be inconsistent with the facts as described in the stipulation. *Id.* at 12.

The trial counsel, attempting to preserve the sentencing testimony of Cpl B, decided not to offer the stipulation into

² R.C.M. 1001(b)(4) provides that the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the appellant's offense. In addition, evidence in aggravation may include that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of any person. Except in capital cases, a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

evidence. *Id.* at 12. The defense counsel objected to this tactical move, claiming that the appellant signed the stipulation, abided by its terms, and relied on it to his detriment. *Id.* at 12, 13. The military judge correctly ruled that the pretrial agreement required only that the appellant enter into the stipulation of fact, but did not require the Government to offer the stipulation of fact into evidence. *Id.* at 13, 14. He further indicated that the appellant had complied with the terms of the pretrial agreement by entering into the stipulation, and would receive the benefit of his bargain. *Id.* at 12.

The trial defense counsel cited the case of *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002) to support his argument that Cpl B's testimony would contradict the stipulation of fact if it were to be offered and would be inconsistent with the terms of the pretrial agreement. Terlep was charged with rape and burglary with the intent to commit rape. Pursuant to a pretrial agreement and a stipulation of fact, he pled guilty to assault consummated by a battery and unlawful entry of a dwelling. During sentencing, the victim testified that she was raped by Terlep, and described the impact the rape had on her. Our superior court held that while a stipulation of fact cannot be contradicted, there is no prohibition against presenting evidence which "goes beyond" the facts in the stipulation. *Id.* at 348. The court ruled that the victim's sentencing testimony did not contradict the stipulation of fact because the stipulation of fact did not expressly state that a rape did not occur; the stipulation of fact did not expressly provide that the appellant's assault consummated by a battery was the only touching that occurred; and it was not necessarily inferable from the stipulated assault that a rape also did not occur. Finally, defense counsel did not indicate his understanding that the stipulation of fact was limited in nature nor that the parties had additional evidence as to the events of that evening.

After reviewing *Terlep*, the military judge in this case ruled that the Government was free to go beyond the guilty plea and the substantive contents of the stipulation of fact to reveal the entire factual circumstances that occurred between the appellant and Cpl B, including victim impact evidence. Record at 16. He further ruled that not offering the stipulation of fact was not a violation of the pretrial agreement, but cautioned the trial counsel that he would not be permitted to argue that this was a forcible sodomy case. *Id.* at 17.

The following colloquy then ensued between the military judge and the detailed defense counsel:

- MJ: Okay. Based on this, do you feel that you have been misled, and that you want to consider withdrawing from the pretrial agreement?
- DC: No, sir. We do not see that we were misled, but we want to make sure that it's on the record that this

stipulation of fact was presented to the government; they made their appropriate changes; both parties agreed; we signed it; the accused signed it; and it was not an issue on either side until prompted by the Court

MJ: The Court did notice that there was going to be a conflict and brought this issue. That is correct.

DC: Yes, sir.

MJ: I perceived, based on what you had all related to me there in the 802 conference, that there was going to be a problem, and decided I was going to address that problem.

DC: Yes, sir.

MJ: I believe that in the management and the due administration of justice, that's what my duty is as a military judge, to ensure that those things are addressed.

DC: I understand, sir.

Id. at 18.

It is clear from our review of the record that the military judge was not an advisor to the Government as the appellant claims, and there were no reasonable grounds to question his impartiality. To the contrary, the military judge anticipated a potential legal error and addressed it first at an R.C.M. 802(b) conference and then for the record at an Article 39(a) session. *Id.* at 18. There was no reasonable basis to question the partiality of the military judge and thus no need for him to disqualify himself *sua sponte*. R.C.M. 902(d)(1); *see Burton*, 52 M.J. at 226 (citing *United States v. Kincheloe*, 14 M.J. 40, 50 n.14 (C.M.A. 1982)). Further, the trial defense counsel did not object or move for the military judge to disqualify himself. *Foster*, 64 M.J. at 333. We find the appellant's contention that the military judge exhibited partiality by advising the trial counsel on trial tactics regarding the stipulation of fact to be without merit.

Bias of the Military Judge

The appellant also asserts that the military judge exhibited personal bias and/or prejudice toward the appellant specifically and homosexuals in general, by purportedly commenting during a post-trial debriefing with counsel that Marines should not be required to live in the barracks with people "like Seaman Hayes," and that homosexuality has no place in the armed forces. As support for this comment, the appellant cites only the 15 July 2005 clemency petition submitted by trial defense counsel to the convening authority. Appellate Government counsel argues that statements of counsel are not competent evidence and thus appellant's claim should not be considered by this court. Government Brief of 12 Dec 2006 at 7.

Post-Trial Facts

In his request for clemency to the convening authority, the trial defense counsel wrote:

During this debrief, [the military judge] went on to explain his feelings on homosexuality in the Marine Corps and the Armed Services as a whole. Contained in the discussion were comments about how Marines should not be required to live in the barracks with people "(l)ike Seaman Hayes", and how homosexuality has no place in our Armed Forces.

Clemency Request of 15 July 2005. The trial defense counsel did not request a hearing or a retrial on the alleged bias.

On 25 August 2005, the staff judge advocate (SJA) sent a letter to the military judge, via the circuit military judge, inviting him to provide a written response to the trial defense counsel's accusation of bias. The circuit military judge responded to the SJA on 9 September 2005, and averred that MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) prohibits the taking of testimony or use of affidavits from members to challenge the deliberative process and therefore the military judge's testimony or affidavit to address his alleged post-trial comments was prohibited.³ He further indicated that the convening authority could order a post-trial Article 39(a) session, pursuant to R.C.M. 1102, if necessary.

On 11 October 2005, the SJA submitted an addendum to his original staff judge advocate's recommendation (SJAR). In his addendum, the SJA noted the trial defense counsel's allegation of bias and lack of comment by the military judge regarding these allegations. The SJA opined that nothing submitted by the defense warranted clemency, and did not recommend a post-trial Article 39(a) session to address the defense counsel's allegation. Neither the trial counsel nor the appellate government counsel provided a denial or rebuttal to the allegations of bias submitted by the defense counsel.

We see the issue as two-fold: First, whether an unsworn, unchallenged, and unrebutted allegation by a defense counsel contained in a clemency petition is competent evidence for this court to consider. Second, if we find the trial defense

³ The circuit military judge cited *United States v. Gonzalez*, 42 M.J. 373, (C.A.A.F. 1995) for support of the proposition that MIL. R. EVID. 606(b) shields the deliberative process of the military judge. *Gonzalez*, was subsequently overruled by *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005) in which our superior court held that MIL. R. EVID. 606(b) applies to court members only, and does not apply to protect the statement of the military judge. We note that *McNutt* was decided on 27 September 2005, approximately three weeks after the circuit military judge's 9 September 2005 letter to the staff judge advocate.

counsel's comments to be competent evidence, we must decide if the comments of the military judge are indicative of actionable bias or prejudice toward the appellant.

Law

In *McNutt*, the military judge commented during a "bridging the gap" session⁴ with counsel that he considered good time credit when calculating the appellant's confinement to ensure he would serve a certain number of days. The trial defense counsel submitted a letter to the convening authority, pursuant to R.C.M. 1105, citing the comments the military judge made during the "bridging the gap" session to support his assertion that the military judge had erred in formulating confinement by considering collateral matters. *McNutt*, 62 M.J. at 18. This assertion was not rebutted by the appellate Government counsel. *Id.* at n.7.

Our superior court held that the military judge erred in considering the Army's policy of "good-time" credit when fashioning his sentence.⁵ *Id.* at 17. Interestingly, the majority opinion did not address whether the trial defense counsel's assertion consisting of an unsworn letter to the convening authority was competent evidence. Essentially, the majority accepted the letter as a true statement of the military judge's comments during the "bridging the gap" session.

In a separate opinion, in which she concurred in part and dissented in part, Judge Crawford criticized the majority's tacit acceptance of the trial defense counsel's unsworn claim. Judge Crawford wrote that the record and factual findings of the court below established only that trial defense counsel timely complained to the convening authority that the military judge had unfairly sentenced the appellant. *Id.* at 24. She further stated "[t]o support this complaint, there is not now, nor has there ever been, any competent evidence of the military judge's statement." *Id.* She faulted the majority for deciding to award relief on the basis of an un rebutted, unsworn, post-trial factual assertion by a defense counsel to a convening authority. She further criticized the majority for accepting the statement as true simply because the military judge did not rebut the statement when there was no evidence to suggest the military judge was given an opportunity to rebut the statement. Judge Crawford concluded by stating that Congress has not empowered the court to find such facts, and that unless the court addressed the

⁴ "Bridging the Gap" sessions are post-trial meetings intended to be used as professional development and skill for trial and defense counsel. *McNutt*, at 17 n.1; see also *United States v. Copening*, 34 M.J. 28, 29 (C.M.A. 1992).

⁵ The military judge sentenced the appellant to 70 days of confinement vice 60 days because he was aware of the correctional facilities' policy of granting 5 days of confinement credit per month for sentences of less than 12 months confinement.

trial defense counsel's claim *arguendo*, the proper remedy was to remand for a *DuBay* hearing.⁶ *Id.* at 30, 31.

Analysis

In the instant case, we are presented with similarities and differences in comparison with *McNutt*. Both cases have unsworn assertions from the defense counsel contained in post-trial clemency submissions, unsupported by affidavits or declarations, citing comments made by a military judge during a debriefing session. Both cases, have allegations that improper collateral matters were considered in sentencing: the Army's good time policy in *McNutt*, and the military judge's opinions on homosexuality in the Armed Forces and in the Marine Corps here. There was no evidence in *McNutt* that the military judge was given an opportunity to respond to the allegation or that he was even made aware of the allegation whereas, here, the SJA offered the military judge the opportunity to address the comments he allegedly made during the debriefing session, but the circuit military judge responded that such comment would be improper. In both cases, the SJAR contained an addendum disagreeing with the defense counsel's claim of legal error, but not disputing or contradicting the underlying factual assertions nor ordering a post trial Article 39(a) session pursuant to R.C.M. 1102.⁷ Finally, in both case, the convening authority approved the sentence as adjudged.

Thus we are left to determine the course of action in this case. As we see it, we have three options: (1) since the trial defense counsel's assertions were not made in affidavit or declaration format, we can find that there is no competent evidence before us to decide the issue; (2) remand the case for a *Dubay* hearing; or (3) address the issue *arguendo*.

We find that the unsworn allegation of the appellant is no competent evidence absent an affidavit or declaration which substantiates his claim of bias. We note that collateral claims (those which do not go directly to the issue of guilt or innocence of the appellant) are typically supported by affidavits or unsworn allegations. *See United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004). In *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006). The appellant claimed that excessive post-trial delay prevented him from procuring his DD-214 which was necessary for him to apply for financial aid to college. Our superior court held that appellant failed to substantiate any claim of prejudice because he relied solely on the assertions of his defense counsel in a post-trial clemency submission to the convening authority. *Id.* at 98.

⁶ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁷ *United States v. McNutt*, 59 M.J. 629 (Army Ct.Crim.App. 2003), *aff'd in part and reversed in part*, 62 M.J. 16 (C.A.A.F. 2005).

This court has also refused to consider allegations not in affidavit or declaration form. In *United States v. Ramirez*, No. 200401005, 2006 CCA LEXIS 54, unpublished op. (N.M.Ct.Crim.App. 27 Feb 2006), the defense counsel attached three e-mails to the record of trial to support his claim of judicial partiality. The e-mails purported to be the then-existing impressions of trial participants who observed the military judge directing comments to the appellant immediately after the trial concluded. The e-mails did not contain the substance or a summary of what the military judge allegedly said to the appellant nor where they attested to by the individual authors. Nor did the appellant or his trial defense counsel submit an affidavit detailing the comments of the military judge or what prejudice the appellant suffered as a result. This court held that there were "no judicially credible facts" before it to decide the allegation of judicial impartiality. Further, in *United States v. Jourden*, No.200500086, 2006 CCA LEXIS 336, unpublished op. (N.M.Ct.Crim.App. 27 Dec 2006), the trial defense counsel, claiming illegal pretrial punishment, stated in his post-trial clemency submission to the convening authority that the appellant was segregated from other inmates for 23 out of 24 hours daily and was shackled whenever he left his cell including in the shower. This court held that the appellant failed to provide any evidence to substantiate the allegations in the form of affidavits or similar source of facts to support the "bald assertions" of trial defense counsel.

However, in *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003), the junior member of the court-martial panel provided a letter to the trial defense counsel describing her concerns with the members sentencing deliberations. The letter was submitted by the defense counsel as part of the appellant's post-trial request for clemency. Our superior court held that the letter did constitute some evidence that unlawful command influence may have taken place because the letter was "detailed" and "based on her own observations." *Id.* at 259.

Here, we recognize that the trial defense counsel has leveled a serious accusation against the military judge. However, the form of that accusation, one paragraph of a six paragraph, three page letter to the convening authority, is troubling to us. Purportedly, we have the alleged comments made by the military judge during a portion of the debriefing session. We do not know if the comments were quoted verbatim, or in what context they were made, or if they were made at all. For instance, we do not know if the military judge was discussing the Armed Forces policy on homosexuality when he made the alleged comments. In short, the mere assertions of trial defense counsel are not factually substantiated, and without an affidavit or declaration with significantly more detail, we will not speculate as to what went on during the debriefing session. Thus we find that the appellant has not substantiated a case of bias against the military judge, as there is no competent evidence before us, and we find no merit to appellant's claim.

The appellant requests that alternatively we remand the case for a *Dubay* hearing. We are mindful that our guidance for determining whether a *Dubay* hearing is necessary to resolve a factual matter is the standard developed in *Ginn. United States v Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Military appellate courts return cases to the trial level when it becomes necessary to develop facts not contained within the record of trial and where affidavits do not suffice. *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). Both *Ginn* and *Campbell* discussed the issue of whether *Dubay* hearings requested on the basis of affidavits, were required. In this case, we have no affidavits, thus the law as set forth in *Ginn* and *Campbell* is inapplicable. We find that without an affidavit, declaration or attestation in support of the appellant's assertion of bias there is not a sufficient basis for this court to remand for a *Dubay* hearing.

Assuming, *arguendo*, that the military judge made the post-trial comments as alleged by the trial defense counsel, we do not agree that the comments are necessarily indicative of bias. We note that, unlike the *Miller* case cited by the appellate Government counsel in his brief, the remarks of the military judge here were not made during the court-martial proceedings, but post-trial.⁸ *United States v. Miller*, 48 M.J. 790 (C.A.A.F. 1998). We find this important, because our extensive review of the record reveals that the military judge was fair and even-handed during the trial and did not exhibit any hostility toward the appellant during the court-martial proceedings. *Id.* at 793. In fact, we find no indicia to suggest the military judge harbored any bias or prejudice toward the appellant during the court-martial. Further, we find that the alleged comments of the military judge, considering the facts of this case, to be a statement reflecting his feelings on the crime itself and not the individual committing the crime. Put another way, the military judge's comment could be viewed as an indication that there is no place in the military for sexual offenders regardless of their sexual disposition or orientation.

We note that the appellant pled guilty to committing a serious indecent act with Cpl B, and that during sentencing, Cpl B elaborated upon the incident and described the impact the incident had upon him. We also note that we do not find the military judge's sentence of 12 months confinement excessive or inappropriate, especially considering that this case was originally recommended to be referred to a general court-martial. We find no evidence of bias or prejudice on the part of the military judge during the court-martial proceedings to support the defense claim.

As the United States Supreme Court has stated, "[n]ot establishing bias or partiality, however, are expressions of

⁸ In *Miller*, the military judge made derogatory comments about the appellant while presiding over the case.

impatience, dissatisfaction, annoyance and even anger, that are within that bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). The military judge's post-trial comments were indicative of dissatisfaction with the crime committed by the appellant rather than bias or prejudice toward the appellant, and standing alone do not suggest the military judge held such "deep-seated and unequivocal antagonism" towards the appellant as to make "fair judgment impossible." *Id.* at 556.

Convening Authority's Breach of the Pretrial Agreement

The appellant's second assignment of error asserts that the convening authority breached the pretrial agreement when the Government presented the sentencing testimony of Cpl B, which he asserts contradicted the stipulation of fact.

Paragraph 12 of the pretrial agreement provides:

As inducement for the acceptance of this Agreement, I offer to enter into a Stipulation of Fact contained in Appendix I. I agree that the facts contained therein are true and that these facts cannot be contradicted by either side. I also agree not to object to the Stipulation of Fact on any evidentiary basis. I further understand that this Stipulation of Fact *may be used* by the Government during the providency inquiry and during the presentencing proceeding.

Appellate Exhibit II at 4 (emphasis added); ("I" refers to the appellant).

The plain language of paragraph 12 of the pretrial agreement indicates that the Government had an option to use the stipulation of fact during the providency inquiry and during presentencing. The Government was not required to offer the stipulation of fact into evidence as the appellant concedes. The Government's decision not to offer the stipulation of fact into evidence was not a breach of the pretrial agreement. The appellant asserts, however, that the Government contradicted the stipulation of fact by offering aggravation evidence regarding forcible sodomy during the sentencing hearing.

Our superior court has addressed this issue in *Terlep*. *Id.*⁹ Here, as in *Terlep*, the testimony of Corporal B, the victim, expanded upon, but did not contradict, the stipulation of fact. The stipulation of fact was purposefully vague and did not

⁹ We note that appellate defense counsel fails to cite *Terlep* in their brief to this court. Rule 3.3 of the Navy Judge Advocate General Rules of Professional Responsibility provides: (a) a covered attorney shall not knowingly (3) fail to disclose to the tribunal legal authority in the covered jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel.

indicate whether the indecent acts were consensual or non-consensual, nor did the stipulation expressly state that a forcible sodomy did not occur, and did not expressly provide that the indecent act was the only touching that occurred. Further, it was not necessarily inferable from the stipulated indecent act that anal sodomy also did not occur. Additionally, the Government is permitted to present victim impact evidence in aggravation. R.C.M. 1001(b)(4). Finally, we note that the stipulation was never offered into evidence. We find the appellant's second assignment of error to be without merit.

Ineffective Assistance of Counsel

The appellant also asserts his trial defense counsel was ineffective because he failed to voir dire the military judge after it became apparent that the military judge was biased, and further neglected to ask the military judge to disqualify himself. The appellant does not state when it became apparent that the military judge was not impartial. We find that the military judge was impartial during the court-martial proceedings. Therefore, we disagree that the trial defense counsel was ineffective. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Inappropriately Severe Sentence

The appellant contends that the sentence is inappropriately severe for what amounts to a consensual sex act, considering the appellant's record of service and his character. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268.

Post-Trial Delay

The appellant claims he was denied speedy post-trial processing because it took 503 days to docket his case with this court. We disagree, although we note our displeasure that it took 174 days for the convening authority to accomplish the routine task of forwarding the record of trial to this court.

In light of *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. After doing so, we conclude that any error caused by

post-trial processing delay is harmless beyond a reasonable doubt. We also note that no allegations of specific prejudice are claimed by the appellant. Any delay does not affect the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

Accordingly, the findings and the sentence as approved below are affirmed.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court