

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Rayfield VELAZQUEZ
Boatswain's Mate Seaman (E-3), U.S. Naval Reserve**

NMCCA 200602421

Decided 16 August 2007

Sentence adjudged 12 June 2006. Military Judge: C.L. Reismeier. Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

LT DARRIN MACKINNON, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant in accordance with his pleas, of adultery, breaking restriction, and indecent assault, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to reduction to pay grade E-1, confinement for five years, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended confinement in excess of three years for 12 months thereafter. CA Action of 9 Nov 2006.

We have reviewed the record of trial, the appellant's 11 assignments of error,¹ the Government's answer, the appellant's

¹ I. APPELLANT'S CONVICTION FOR "WRONGFUL SEXUAL INTERCOURSE" VIOLATES HIS VITAL INTEREST IN LIBERTY AND PRIVACY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

II. APPELLANT WAS DENIED HIS [SIXTH] AMENDMENT RIGHT TO COUNSEL WHEN HIS ATTORNEY-CLIENT RELATIONSHIP WITH DETAILED COUNSEL WAS SEVERED BY THE GOVERNMENT WITHOUT GOOD CAUSE.

reply, and the affidavits. We conclude that the action taken on the sentence is contrary to the pretrial agreement in that the action suspends confinement from the end of confinement rather than from the date of the action as agreed to in the pretrial agreement. See Appellate Exhibit XXXI. We will remedy that error in or decretal paragraph.² Otherwise, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a married Navy reservist, was assigned to INSHORE BOAT UNIT 21 (IBU-21) located in Newport, RI. In September 2004, the appellant's unit was activated for 365 days for service in Fujairah, United Arab Emirates (UAE), arriving there in November 2004. On 18 June 2005, the appellant broke

III. THE GOVERNMENT VIOLATED THE [THIRTEENTH] AMENDMENT BY SUBJECTING APPELLANT TO A STATUS OF SLAVERY OR INVOLUNTARY SERVITUDE, BEFORE TRIAL, IN BAHRAIN, BY ORDERING HIM TO WORK FOR SEVERAL MONTHS, WITHOUT COMPENSATION, AND NOT AS PUNISHMENT FOR A CRIME TO WHICH HE WAS DULY CONVICTED, IN A PLACE SUBJECT TO UNITED STATES JURISDICTION.

IV. THE GOVERNMENT SEVERED ITS COURT-MARTIAL JURISDICTION OVER APPELLANT WHEN IT TERMINATED ITS MORE FUNDAMENTAL FIDUCIARY RELATIONSHIP WITH HIM.

V. APPELLANT WAS SUBJECTED TO ILLEGAL PRETRIAL PUNISHMENT AND DENIED DUE PROCESS OF LAW WHEN HIS PAY WAS STOPPED AT THE END OF HIS OBLIGATED SERVICE, YET HE WAS STILL ORDERED TO, AND DID, PERFORM MILITARY DUTIES FOR SEVERAL MONTHS WHILE AWAITING HIS ARTICLE 32 [SIC] AND HIS COURT-MARTIAL.

VI. APPELLANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE GOVERNMENT INTERFERRED WITH AND HINDERED THE DEFENSE INVESTIGATION OF HIS CASE.

VII. APPELLANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE GOVERNMENT ASSIGNED HIM A FEMALE ATTORNEY WHO WAS OBLIGATED TO CONDUCT AN INVESTIGATION IN THE UNITED ARAB EMIRATES (UAE), A NATION WHERE WOMEN ARE SYSTEMICALLY DISCRIMINATED AGAINST, THEREBY HINDERING THE INVESTIGATION AND UNDERMINING HIS DEFENSE.

VIII. APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS FEMALE DEFENSE ATTORNEY DID NOT SEEK HIS INFORMED CONSENT TO CONTINUE REPRESENTING HIM GIVEN THE KNOWN INVESTIGATIVE BARRIERS OF SEX DISCRIMINATION IN UAE.

XIX. AS A RESERVIST, APPELLANT BELONGED TO A CLASS THAT, IN COMPARISON WITH ACTIVE DUTY PERSONNEL, IS DENIED EQUAL PROTECTION OF THE LAW.

X. APPELLANT'S SENTENCE WAS INAPPROPRIATELY SEVERE.

XI. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS DID NOT 1) MAKE A SPEEDY TRIAL MOTION AND 2) DID NOT REQUEST THAT THE CONVENING AUTHORITY DEFER FORFEITURES TO HIS SPOUSE FOR SIX MONTHS, CONSISTENT WITH THE RECOMMENDATION OF THE MILITARY JUDGE.

² An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002).

restriction³ by leaving his apartment in Fujairah to be with his girlfriend, a guest-worker from the Philippines. He brought his girlfriend back to his apartment where he sexually assaulted her and had sexual intercourse with her.

The appellant was notified two days later that criminal allegations had been made against him based on the events of 18 June 2005, and he was transferred to Bahrain for investigation and legal proceedings. The appellant was initially assigned to the holding barracks and later transferred to the bachelor enlisted quarters (BEQ). The appellant was not in confinement, however he was not allowed to leave the base. The appellant was assigned to a security detail and performed his military duties.

The appellant's unit returned to Newport, RI, in September 2005 without him. The appellant was involuntarily extended on active duty before his one-year recall orders, scheduled to terminate in September 2005, expired. On or about 1 October 2005, the appellant stopped receiving pay and allowances. He had to pay for his BEQ room and his food without the pay and allowances he was entitled to receive. His BEQ room cost \$12.00 per day and his food cost \$20.00 per day. The appellant eventually received a lump sum payment of approximately \$2,500.00 from the Government in December 2005.

Within a few days of the appellant's arrival in Bahrain in June 2005, Lieutenant (LT) Timothy R. Parr, JAGC, USN, was detailed to represent him. LT Parr established an attorney-client relationship with the appellant as he prepared for the Article 32, UCMJ, hearing scheduled for December 2005, and represented the appellant at that hearing. In late December 2005, LT Parr informed the appellant that his case was being moved to Norfolk, VA, and that an attorney there was being assigned to represent him.

LT Parr prepared an individual military counsel (IMC) request for the appellant's signature. That form requested the legal representation of "LT Gretchen Bundy, JAGC, USNR," and specifically released LT Parr from further representation. Appellate Exhibit III. The appellant subsequently changed his mind and decided that he did want to keep LT Parr's services. The appellant's IMC, LT Bundy, drafted a request that LT Parr remain on the case, AE IV, however, that request was denied prior to the appellant's 17 February 2006 arraignment. AE V. At his arraignment, the appellant orally requested to be represented by his IMC, LT Bundy, and his previous detailed defense counsel, LT Parr.

Although LT Parr was not made available, an assistant defense counsel, LT Cheryl Brooks-Williams, JAGC, USNR, was detailed to the appellant's case, and the appellant retained

³ The appellant's commanding officer imposed restriction on 5 June 2005 as a nonjudicial punishment for an offense unrelated to the court-martial charges.

civilian defense counsel, Mr. Greg D. McCormack, both of whom made their initial court-martial appearances on 19 May 2006. Record at 38. At that hearing, the appellant affirmatively stated that he did not want any attorney other than LT Bundy, LT Brooks-Williams, and Mr. McCormack. *Id.* at 41. On 12 June 2006, the appellant released his IMC, LT Bundy, from further representation and affirmatively stated that he only wanted to be represented by his assistant defense counsel, LT Brooks-Williams, and his civilian defense counsel, Mr. McCormack. *Id.* at 151-52; AE XXVIII.

Because the appellant raises multiple issues for the first time on appeal, we will begin with a general discussion of the forfeiture and waiver doctrines.

Forfeiture and Waiver Doctrines

There is a preference for issues to be raised at the trial level. Failure to raise an issue below results in that issue being forfeited or waived on appeal. The rationale behind forfeiture and waiver is the elimination of expense, both to the parties and the public, of rehearing an issue that could have been resolved by a timely objection or motion at the trial level. "This principle is 'essential' to the continued effectiveness of our heavily burdened trial and appellate judicial systems." *United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003)(quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). Failing to raise issues at the trial level results in "expensive, time-consuming appellate litigation characterized by undeveloped factual records (which could have been created at the trial level), the resulting need for remands and rehearings, and the difficulty in conducting those proceedings years later" *Id.* at 465. The Supreme Court has described the purpose behind forfeiture and waiver as follows:

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . Recognition of this general principal has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged [below].

Helvering, 312 U.S. at 556. We will discuss the applications of the forfeiture or waiver doctrines to military law.

1. Issues forfeited or waived if not raised

The President incorporated the forfeiture and waiver doctrines into the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) through provisions that require an appellant to raise an issue at trial,⁴ object to something at trial,⁵ or to enter a not guilty plea or a conditional guilty plea at trial,⁶ in order to preserve certain issues on appeal. The purpose of the MCM's "raise or waive rule is to promote the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." *Inong*, 58 M.J. at 464 (quoting *United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003)(internal quotation marks omitted). Our superior courts have consistently applied these doctrines and implementing MCM provisions to a multitude of issues.⁷

⁴ See, e.g., R.C.M. 905(e)(failure to raise certain defenses, objections, motions, or requests prior to entering of pleas results in waiver); R.C.M. 912(b)(3)(issue of improper selection of members is waived absent a timely motion, with certain exceptions); MILITARY RULE OF EVIDENCE 311(d)(2)(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)(an accused must, prior to entering pleas, move to suppress or object to evidence obtained by an unlawful search or seizure, or the issue is waived).

⁵ See, e.g., R.C.M. 919(c)(failure to object to argument forfeits the issue); R.C.M. 920(f)(failure to object to findings instructions forfeits the issue); R.C.M. 1005(f)(failure to object to sentencing instructions forfeits the issue); R.C.M. 1106(f)(6)(failure to object to matters in the staff judge advocate's recommendation forfeits the issue); MILITARY RULE OF EVIDENCE 103(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)(failure to object to admission of evidence forfeits the issue).

⁶ See, e.g., R.C.M. 910(a)(2)(with approval of the military judge and consent of the Government, an accused may preserve adverse rulings on pretrial motions for appeal by entering a conditional guilty plea); R.C.M. 910(j)(guilty plea waives any objection to the factual issue of guilt); MIL. R. EVID. 304(d)(5)(unconditional guilty plea waives all involuntary statement issues concerning the charge plead to); MIL. R. EVID. 311(i)(unconditional guilty plea waives all Fourth Amendment and MIL. R. EVID. 311-317 issues concerning the charge plead to).

⁷ See, e.g., *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987)(failure to raise Fifth Amendment due process claim below waived that issue on appeal); *United States v. Mizgala*, 61 M.J. 122, 124-27 (C.A.A.F. 2005)(speedy trial issues under the Sixth Amendment, Article 10, UCMJ, and R.C.M. 707, not raised at trial, are waived by a voluntary guilty plea); *Inong*, 58 M.J. at 465 (Article 13, UCMJ, claims of illegal pretrial punishment are waived if not raised at trial); *United States v. Britton*, 47 M.J. 195, 200 (C.A.A.F. 1997)(former jeopardy waived if not raised below); *United States v. Lloyd*, 46 M.J. 19, 24-25 (C.A.A.F. 1997)(guilty pleas generally preclude the post-trial litigation of factual questions pertaining to guilt); *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993)(argument error is waived if not objected to); *United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992)(generally a violation of Article 22(b), UCMJ, [accuser] is waived if an accused and his counsel are well aware thereof and make no objection or protest at trial); *United States v. Troxell*, 30 C.M.R. 6, 7 (C.M.A. 1960)(statute of limitations is waived if not raised); *United States v. Graham*, 37 M.J. 603, 605 (A.C.M.R. 1993)(timeliness of the magistrate's review of pretrial confinement not raised at trial is waived).

2. Exceptions to the forfeiture and waiver doctrines

Issues involving jurisdiction, including whether a specification alleges an offense, not raised below may be brought for the first time on appeal. See R.C.M. 905(e). In addition, our superior court has found exceptions to the forfeiture and waiver doctrines that do not include jurisdictional issues.⁸

Plain error is also an exception to the forfeiture and waiver doctrines. If a forfeited or waived error "materially prejudices the substantial rights of appellant . . . , or . . . seriously affects the fairness, integrity, or public reputation of judicial proceedings," an appellate court may "exercise its discretion to reverse on a forfeited error." *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000)(citations omitted). The plain error exception, however, "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)(internal quotation marks omitted).

Forfeited or Waived Issues

With these principles and precedent in mind, we will address the appellant's assignments of error to determine which, if any, have been forfeited or waived on appeal. We begin with the observation that most of the assignments of error pertain to factual situations that were known to the appellant prior to the entry of his unconditional guilty pleas, yet were not raised.

Prior to the appellant's unconditional guilty pleas, the appellant's civilian defense counsel stated that the defense did not have any motions. Record at 161-62. The appellant, by way of his pretrial agreement, agreed not to raise certain motions, not involved here, and specifically stated that he "has no other motions." AE XXX at 4. Although we do have affidavits from the appellant and his original detailed defense counsel, LT Parr, we are otherwise left with an undeveloped factual record upon which to resolve many of the assignments of error. Of the issues that we conclude have been forfeited or waived, we will only discuss the issues concerning the attorney-client relationship in order to explain why those issues are forfeited or waived.⁹

⁸ See, e.g., *Mizgala*, 61 M.J. at 127 (a litigated speedy trial motion under Article 10, UCMJ, is not waived by a subsequent unconditional guilty plea); *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990)(the waiver doctrine does not apply to mandatory instructions to members); *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)(waiver doctrine does not apply when an appellate court deems review is necessary under its statutory review mandate). *United States v. Caylor*, 40 M.J. 786, 788 (A.F.C.M.R. 1994)(although a guilty plea waives some issues, a guilty plea may be attacked as involuntary or coerced).

⁹ We have considered the appellant's third (Thirteenth Amendment slavery violation resulting from pay problem), fifth (illegal pretrial punishment), sixth (Fifth Amendment due process violation by Government interference with investigation), and ninth (reservists are denied equal protection when

1. Improper severance of the attorney-client relationship

For his second assignment of error, the appellant claims that the Government improperly severed his attorney-client relationship with his detailed defense counsel, LT Parr, because: (1) there was no "consent" to the termination; and, (2) the detailing authority failed to show "good cause" for not detailing him back to the case on the appellant's request.

There is authority for not imposing the forfeiture or waiver doctrines to issues involving the severance of the attorney-client relationship. See *United States v. Morgan*, 62 M.J. 631, 633 (N.M.Ct.Crim.App. 2006). However, in this case, we conclude that the appellant affirmatively waived the issue concerning the severance of his relationship with LT Parr. Additionally, we conclude that the appellant forfeited the issue concerning the detailing authority's refusal to re-detail LT Parr to the case. We will discuss our rationale for each conclusion.

By way of post-trial affidavits, LT Parr and the appellant now claim that the IMC request was not their idea, and therefore, the appellant argues that he should not be held responsible for that request. The appellate filings and the record as a whole, however, compellingly demonstrate the improbability of those allegations. See *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We can, therefore, resolve the issues without ordering further fact-finding. *Id.*

A. Termination of LT Parr's representation

LT Parr was the appellant's original detailed defense counsel who represented the appellant from the beginning through the Article 32, UCMJ, investigation. When the Government chose to move the appellant's court-martial from Bahrain to Norfolk, VA, LT Parr prepared an IMC request for the appellant's signature, specifically requesting that LT Gretchen Bundy, JAGC, USNR, be appointed as the appellant's IMC. That request also states "I do not request that my detailed defense counsel, LT Timothy R. Parr, JAGC, USNR (sic), continue to represent me along with individual military counsel." AE III at 2.

While the decision to move the appellant's case from Bahrain to Norfolk was not of the defense team's making, the decision to request another attorney and release LT Parr was. The appellant and LT Parr could simply have decided not to request an IMC and LT Parr would have remained on the case unless the Government could show "good cause" to sever the relationship. R.C.M. 505(d)(2)(B). Subsequently, the appellant twice stated on the record that he was satisfied with the attorneys who were present in the courtroom, and he affirmatively stated that he did not

compared to active duty) assignments of error and conclude they were forfeited or waived by the appellant's failure to raise them below. Even if not forfeited or waived, we find them to be without merit.

want any other attorneys, which included LT Parr. Record at 39-40, 152. The appellant's affirmative release of LT Parr in the IMC request, combined with his affirmative statements on the record, serve as an affirmative waiver of the issues surrounding the release of LT Parr.

Even if the appellant did not affirmatively waive this issue or forfeit it by not raising it below, we conclude that LT Parr was properly released from further representation obligations. The right to specific counsel in the military is not absolute. *United States v. Beckley*, 55 M.J. 15, 23 (C.A.A.F. 2001)(citing R.C.M. 506(c)). R.C.M. 505(d)(2)(B) authorizes detailed defense counsel to be excused after the formation of an attorney-client relationship under three conditions. First, detailing authorities may sever an existing relationship once an IMC requested by an accused has entered the case. Second, an accused may request or consent to the severance. Third, the Government may sever an attorney-client relationship without the appellant's consent for "good cause."

In the instant case, R.C.M. 505(d)(2)(B) was followed. First, the attorney-client relationship between the appellant and LT Parr was terminated as a result of the appellant's IMC request drafted by LT Parr. Second, in the context of an IMC request, an accused has the right to request that his detailed defense counsel be permitted to remain on the case as an associate defense counsel. The appellant, however, did not avail himself of this opportunity and affirmatively requested that LT Parr be released from his case. Therefore, LT Parr was released at the appellant's request and consent. No relief is warranted under these circumstances.

B. Detailing authority's refusal to re-detail LT Parr

Once the appellant was in Norfolk, a conference was held pursuant to R.C.M. 802 in which LT Parr participated by telephone, and the military judge was advised that an IMC request had been submitted for LT Bundy. Record at 12. After that R.C.M. 802 conference, but before arraignment, the appellant requested that LT Parr be re-detailed to his case. *See* AE IV. LT Parr's commanding officer denied that request. *See* AE V. Whether a detailing authority abuses his or her discretion in denying a request to keep detailed defense counsel in addition to an IMC must be raised prior to entering pleas or they are forfeited or waived on appeal. R.C.M. 905(b)(6); R.C.M. 905(e). The appellant never filed a motion challenging the detailing authority's denial of his request for LT Parr to be re-detailed to his case.

Even assuming, without deciding, that the detailing authority abused her discretion in denying the appellant's request for LT Parr, we do not find a plain error exception to the waiver rule here. Denying the request for LT Parr to be re-detailed to the appellant's case did not "materially prejudice[]

the substantial rights of appellant . . . , or . . . seriously affect[] the fairness, integrity, or public reputation of [the] judicial proceedings," and applying waiver under these circumstances will not result in "a miscarriage of justice" *Ruiz*, 54 M.J. at 143. Therefore, no relief is warranted.

Issues Not Forfeited or Waived

1. Improvident plea to adultery

For his first assignment of error, the appellant asserts that his plea to adultery was improvident because the "military has no legitimate interest in punishing consensual sexual activity" between the appellant and a civilian, in part, because he had a constitutionally protected liberty interest "in his private romance and sexual affairs with a civilian adult." Appellant's Brief at 12. The appellant cites *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) for support.

In essence, the appellant is challenging the court's subject matter jurisdiction to proceed against him on an adultery charge involving consenting adults. Subject matter jurisdiction is not forfeited or waived on appeal. *See* R.C.M. 905(e).

We disagree with the appellant's analysis. The appellant's claim to a constitutionally protected "liberty interest" in sexual intercourse with a foreign guest-worker in the UAE after breaking restriction to retrieve her from her apartment and bringing her to his own apartment does not withstand scrutiny. The appellant admitted during providence that his conduct was prejudicial to good order and discipline and was service discrediting because others knew about the adultery, it became a topic of discussion, and generated some notoriety in a foreign country. Record at 201-03. We disagree with the appellant's assessment, and find that the appellant's admitted conduct falls outside the liberty interest established in *Lawrence*. *See Marcum*, 60 M.J. at 207-08 (military's need for discipline may remove even private sexual conduct from the ambit of *Lawrence*); *see also United States v. Orellana*, 62 M.J. 595, 598 (N.M.Ct.Crim.App. 2005), (*Lawrence* conveys no right to commit adultery), *rev. denied*, 63 M.J. 295 (C.A.A.F. 2006).

We conclude, therefore, that subject matter jurisdiction existed over the charged conduct; we do not find a substantial basis in law and fact for questioning the guilty plea; and, therefore, conclude that the military judge did not abuse his discretion by accepting the appellant's guilty plea to adultery.¹⁰

¹⁰ We have also considered the appellant's fourth assignment of error claiming the military lost personal jurisdiction over him during the period that he had a pay problem because Article 2(c)(3), UCMJ, requires actual and

2. Effective assistance of counsel

For his seventh, eighth, and eleventh¹¹ assignments of error, the appellant claims he was deprived of the right to effective assistance of counsel for various reasons. First, he was assigned a female IMC who was obligated to conduct an investigation in a foreign country where women are systemically discriminated against, resulting in a hindered investigation and undermining his defense. Appellant's Brief at 31. Second, his IMC did not obtain the appellant's informed consent to continue representing him once she learned of the investigative barriers she would face in the UAE. *Id.* at 32. Third, his defense team did not file a speedy trial motion, and did not request the CA to defer automatic forfeitures. *Id.* at 38.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 687).

If the issue can be resolved by addressing the prejudice prong of this test, we need not determine whether counsel's performance was deficient. *Id.* at 386 (citing *Strickland*, 466 U.S. at 697). The appellant bears the burden to demonstrate a level of prejudice that indicates a denial of a fair trial or a trial whose result is unreliable. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Quick*, 59 M.J. at 387.

By way of post-trial affidavit, the appellant claims that his IMC told him that her trip to the UAE was not as productive as she had hoped. For example: (1) the trip was too short; (2) her movements were restricted by the "government;" (3) the "government" placed a greater emphasis on the victim's privacy

timely payment of pay and allowances before the person can be subject to jurisdiction. Appellant's Brief at 26. We reject this argument and find that the appellant was subject to court-martial jurisdiction for the entire time he was on active duty beginning in September 2004 and continuing until his active service was "terminated in accordance with law or regulation . . ." because he "received pay and allowances" for October and November 2005 in December 2005. Art. 2(c), UCMJ; see Record at 179-81; see also Appellant's Affidavit.

¹¹ This assignment of error was summarily assigned without citation or request for relief. See N.M.CT.CRIM.APP. RULE 4-3b(7) and (8)(requiring assignments of error to contain supporting legal citation and requested relief).

than his right to a fair and open trial; (4) government officials wanted the investigation "tempered" because they did not want UAE residents knowing about it; (5) his IMC could not get UAE nationals and residents to fully cooperate because she was female; (6) his IMC could not interview the appellant's apartment complex manager who may have had video of the victim leaving the apartment building showing no signs of distress; (6) his IMC could not interview the victim's employer who could have given a motive for the victim to fabricate her allegation of rape; (7) his IMC could not get the taxi company's travel logs that could have shown that the victim visited the appellant's apartment multiple times per week; and, (8) his IMC could not interview the victim's immigration sponsor who the appellant believed had a relationship with the victim, possibly involving prostitution. Appellant's Affidavit at 6. The appellant claims that based on "LT Bundy's ineffective interviews in UAE, her inability to develop my defense, and my loss of LT Parr's services, I panicked and believed that I needed to hire a civilian defense attorney." *Id.*

The appellant's affidavit-based allegations are either speculative or merely conclusory observations without any supporting basis in fact found in the record, or even if true, they are not sufficient to establish ineffective assistance. His claims of ineffective assistance can, therefore, be decided without the need for further fact-finding. *Ginn*, 47 M.J. at 248.

Other than bearing the cost of hiring a civilian attorney, the appellant does not state how he was prejudiced by any of his allegations of ineffective assistance. His affidavit is completely silent on his defense team's failure to file a speedy trial motion or to request deferred automatic forfeitures. Even if everything in the appellant's affidavit is true, he has not demonstrated there would have been a different result but for his counsel's actions. *Quick*, 59 M.J. at 387. Based on the record before us, we conclude that the appellant has failed to overcome the strong presumption of effective assistance of counsel.¹²

Conclusion

The findings and the sentence as approved below are affirmed. The supplemental court-martial order shall show that all

¹² We have considered the appellant's tenth assignment of error, summarily assigned without citation or request for relief, claiming his sentence is inappropriately severe. See N.M.CT.CRIM.APP. RULE 4-3b(7) and (8) (requiring assignments of error to contain supporting legal citation and requested relief). Based on our review of the entire record we find the sentence to be appropriate in all respects for the offenses and the offender. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

confinement in excess of three years is suspended for a period of 12 months from the date of the original CA's action.

Judge KELLY and Judge FREDRICK concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge FREDERICK participated in the decision of this case prior to detaching from the court.