

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

**Before  
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CORY J. HALL  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201200207  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 22 February 2012.

**Military Judge:** Col Daniel J. Daugherty, USMC.

**Convening Authority:** Commanding Officer, Security  
Battalion, Marine Corps Base, Quantico, VA.

**Staff Judge Advocate's Recommendation:** LtCol C.M. Greer,  
USMC.

**For Appellant:** CAPT Johnathan W. Bryan, JAGC, USN.

**For Appellee:** Maj David N. Roberts, USMC.

**23 October 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence,<sup>1</sup> one specification of making a false official statement, three specifications of

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<sup>1</sup> While the military judge found the appellant guilty of this offense, he dismissed the charge and its single specification during the presentencing phase at trial.

wrongful use of a controlled substance, three specifications of wrongful distribution of a controlled substance, and one specification of malingering, in violation of Articles 86, 107, 112a, and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, 912a, and 915. The military judge sentenced the appellant to confinement for 307 days, forfeiture of \$994.00 pay per month for 10 months, reduction to pay grade E-1, a reprimand, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged after reducing confinement by 2 days and ordered it executed, subject to applicable legal limitations.<sup>2</sup>

The appellant raises three assignments of error: (1) that the CA erred in taking his action on the case by approving the findings of guilty as to Charge I and its single specification (unauthorized absence) after the military judge dismissed that charge and specification at trial; (2) that the CA erred in approving only 305 days of the 307 days of confinement adjudged by the military judge and then purporting to suspend subsequently in his action the execution of those two days; and (3) the military judge erred by failing to merge Charge IV and its single specification (malingering) with the specification under Charge II (false official statement) as an unreasonable multiplication of charges as applied to sentence.

After carefully considering the record of trial, the parties' pleadings, and the post-trial documentation, we conclude that the court-martial order is in error, but that there was no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

### **Background**

Between 9 December 2008 and 29 September 2011, the appellant, on at least five occasions, wrongfully distributed or used ketamine (also known as "Special K"), cocaine, and methylenedioxymethamphetamine (also known as "Ecstasy").

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<sup>2</sup> To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

Separately, the appellant went to Leesburg, Virginia, to visit with friends the evening of 7 October 2011, the night before he was scheduled to assume the watch at his appointed place of duty at 0430 on 8 October 2011. However, when the appellant realized he was coming up on the time that he needed to return for work, he concocted a story that he was involved in an altercation which purportedly resulted in a concussion. In furtherance of his plan, the appellant presented himself at an emergency room at a local hospital, feigning injury, and contacted his Desk Sergeant to report that he was in the hospital for further observation and would not be able to make it in time to stand the watch. Thus, the appellant failed to report to duty on time. Record at 13-40.

As part of a pretrial agreement, the appellant agreed to plead guilty to the above offenses before a military judge in exchange for a referral of charges to a special court-martial, and promised to testify against his fellow service members who were also involved in similar drug offenses. While the appellant pled guilty to Charge I and its single specification (unauthorized absence), and the military judge found the appellant guilty of that offense, the military judge dismissed the charge as multiplicitous with Charge IV and its single specification (malingering) during the presentencing hearing. Record at 51, 54. The military judge denied the appellant's request to merge the malingering charge with Charge II and its single specification (false official statement) as multiplicitous for sentencing purposes. The results of trial, staff judge advocate's recommendation (SJAR), and court-martial order all fail to reflect the dismissal by the military judge of Charge I and its specification.

### **Court-Martial Order**

As to the appellant's first assignment of error, we find that the court-martial order fails to reflect that the military judge dismissed Charge I and its single specification (unauthorized absence) after announcement of findings. The military judge held that Charge I and its single specification was multiplicitous with Charge IV and its single specification (malingering) and ordered Charge I and its single specification

dismissed. Record at 54. While the findings announced by the military judge are reflected in the results of trial, SJAR, and court-martial order, it is the absence of this later dismissal of Charge I and its single specification by the military judge that makes the court-martial order problematic. Thus, we conclude that there is an error in the court-martial order, but further conclude there is no prejudice to the appellant.

If an appellant can make "some colorable showing of possible prejudice," this court has plenary review authority under RULE FOR COURTS-MARTIAL 1106(d)(6), MANUAL FOR COURTS-MARTIAL ORDER, UNITED STATES (2012 ed.) and Article 66(c), UCMJ, to remedy the error and provide meaningful relief, or else return the case to the Judge Advocate General for a remand to a CA for a new post-trial recommendation and action. *United States v. Wheelus*, 49 M.J. 283, 288-89 (C.A.A.F. 1998). However, while the colorable threshold showing is low, "the prejudice must bear a reasonable relationship to the error, and it must involve a reasonably available remedy." *United States v. Capers*, 62 M.J. 268, 270 (C.A.A.F. 2005). Further, "[a]t the heart of the colorable showing standard is a requirement that the appellant indicate what post-trial submissions would have been different." *United States v. Danley*, 70 M.J. 556, 560 (N.M.Ct.Crim.App. 2011).

The appellant neither cites *Wheelus, supra*, nor demonstrates that there was any prejudice. In fact, this issue is not at all central to the appellant's post-trial submission. Instead, the appellant focused on the conditions he experienced for two days at a local jail, along with submitting a request for a suspension of forfeitures to help with his finances, and a reduction in confinement to 275 days so he could begin finding future employment. The appellant did not raise any legal issues in his clemency letter of 11 April 2012 or response to the SJAR of 25 April 2012. The CA considered both documents and reduced confinement from 307 to 305 days, but elected not to suspend forfeitures or reduce the sentence any further. The appellant fails to show that his post-trial submissions would have been different if the documents were correct, or that there was a greater chance of clemency. We note that the unauthorized absence is the least significant misconduct to which the appellant entered pleas of guilty.

The appellant alleges in his second assignment of error, and we concur, that the CA erred in approving, as a matter of clemency, 305 days of the 307 days of confinement adjudged by the military judge and then purporting to suspend the execution of those two days. We find that the CA failed to recognize this ambiguity in his action but, for the same reasons noted above, we find no prejudice to the appellant. Accordingly, we will take appropriate action in our decretal paragraph on the first two assignments of error as the appellant is entitled to a record that correctly reflects the results of the court-martial proceedings. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)

### **Unreasonable Multiplication of Charges**

At trial, the appellant argued multiplicity and requested that the specification under Charge IV (malingering) be merged with the specification under Charge II (false official statement) for sentencing purposes. Record at 52-53. The military judge applied *Blockburger v. United States*, 284 U.S. 299 (1932), and held that these two specifications were not multiplicitious in that "there are separate elements and separate acts by [the appellant]," and denied the appellant's request to merge them. *Id.* at 53. The appellant now asserts that these charges constitute an unreasonable multiplication of charges citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

In light of *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), we conclude that the argument at trial regarding multiplicity for sentencing can be fairly construed as an argument that there was an unreasonable multiplication of charges.<sup>3</sup> We, therefore, consider that trial defense counsel preserved this issue, and we review for an abuse of discretion. *Id.* at 22. Rejecting the appellant's assertion of error, we agree with the actions of the court below and conclude that the military judge did not abuse his discretion.

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<sup>3</sup> See Discussion to R.C.M. 906(b)(12), where "[a]fter *Campbell*, 'unreasonable multiplication of charges as applied to sentence' encompasses what had previously been described as 'multiplicity in sentencing.' See *Campbell*, 71 M.J. at 26."

Of the five factors in *Quiroz*, the appellant argues that factors one, three and four weigh in the appellant's favor.<sup>4</sup> Appellant's Brief of 20 Jul 2012 at 13. For the reason stated above, we do not refute factor one. As to factors three and four, the appellant states that "charging [him] with three separate offenses [the false official statement, the malingering, and the unauthorized absence which was later dismissed] for essentially the same transaction exaggerated his criminality and increased his punitive exposure." *Id.* at 14.

We determine that factor two of *Quiroz* presents the pivotal issue in this case: are these two charges (malingering and false official statement) aimed at distinctly separate criminal acts? We find that they are. As the appellant concedes, his "appearance at a local emergency room feigning a concussion was, technically, a discrete act not required as part of his telephone call to [his] Desk Sergeant." *Id.*

The offense of malingering was a separate act by the appellant in that he feigned illness to medical personnel of a local hospital, and then later provided a false official statement to a military service member acting on behalf of the Government. While the appellant used one act to support the other, he directed his wrongdoing to two different groups of individuals. Further, the act of malingering was complete when the appellant satisfied the act of feigning a concussion with hospital personnel in order to support his story when he later contacted his Desk Sergeant to falsely inform him that he was being held at the hospital for further observation. Record at 16, 37. In essence, each part of the plan represented a singular act, each implicating a separate and significant criminal interest, none necessarily dependent upon the others. *Campbell*, 71 M.J. at 24. After feigning a concussion and gaining attention by medical personnel, the appellant could have

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<sup>4</sup> The five factors in *Quiroz* are as follows: "(1) 'Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?'; (2) 'Is each charge and specification aimed at distinctly separate criminal acts?'; (3) 'Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?'; (4) 'Does the number of charges and specifications *unfairly* increase the appellant's punitive exposure?'; and (5) 'Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?'" *Quiroz* 55 M.J. at 338.

changed his mind regarding his intent to lie to his supervisor. See *id.* at 24-25.<sup>5</sup> As such, we find the appellant's third assignment of error without merit and decline to provide relief.

### Conclusion

The findings and the sentence are affirmed. The supplemental court-martial order shall indicate the following:

- (1) Charge I and its single specification were dismissed;  
and
- (2) As a matter of clemency, the CA approved 305 days of confinement.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>5</sup> While the military judge in *Campbell* merged the offenses for purposes of sentencing, the Court of Appeals for the Armed Forces articulated that the transactions carried out by the appellant could have each represented a singular act.