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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DONALD M. JOHNSON
YEOMAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200379
SPECIAL COURT-MARTIAL

Sentence Adjudged: 23 April 2012.
Military Judge: LtCol Chris Thielemann, USMC.
Convening Authority: Commanding Officer, USS RONALD REAGAN (CVN 76).
Staff Judge Advocate's Recommendation: LCDR G.W. Manz, JAGC, USN.
For Appellant: Capt Jason R. Wareham, USMC.
For Appellee: Maj Paul M. Ervasti, USMC; Maj Samuel C. Moore, USMC.

30 September 2013

OPINION OF THE COURT

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

PRICE, Judge:

A special court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of making a false official statement, larceny, and obstruction of justice, in violation of Articles 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 921, and 934. The appellant was sentenced to reduction to pay grade E-1, forfeiture of $994.00 pay per month for 10 months, confinement

for 10 months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises 14 assignments of error including that: (1) trial defense counsel was ineffective by failing to properly submit his request for an individual military counsel (IMC); (2) the military judge abused his discretion by denying the appellant's request to dismiss detailed defense counsel, or to continue the case until the IMC matter could be resolved; (3) the military judge violated his Constitutional Due Process rights by ordering him to cease use of prescription medications during the trial resulting in pain and narcotic withdrawal such that he could not effectively participate in his defense; (4) the military judge erred by admitting Prosecution Exhibit 19; (5) the military judge erred by allowing the trial defense counsel to testify regarding his mental state; (6) trial defense counsel was ineffective by not fully investigating the case and at trial; (7) trial defense counsel was ineffective by refusing to call the appellant's brother as a witness; (8) the evidence of larceny was legally and factually insufficient; (9) there was cumulative error; (10) the sentence was inappropriate; (11) the military judge's denial of proper medical care in the midst of severe narcotics withdrawal violated his Constitutional rights; (12) Lieutenant S formed an attorney-client relationship with the appellant such that the IMC request should have been granted; (13) trial defense counsel failed in their duties when they submitted matters in clemency despite his express desires to withhold submitting clemency until new counsel could be assigned; and, (14) trial defense counsel were ineffective in submitting matters in clemency that did not include the relief he requested.[1]

After careful consideration of the record, the briefs of the parties, the appellant's declarations under penalty of perjury, and the trial defense counsel's declarations under penalty of perjury, we conclude that the findings and the 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.

I. Background

[1] Assignments of Error V-XIV are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant, a yeoman second class (E-5), was assigned to USS RONALD REAGAN (CVN 76). While serving as an officer in REAGAN's Third and Second Class Petty Officers Association (the Association), the appellant stole more than $500.00 worth of currency belonging to the Association, made a false official statement to a criminal investigator about that theft, and obstructed justice by modifying an electronic record to indicate that the stolen funds were transferred to another private organization on board REAGAN.

II. Ineffective Assistance of Counsel

The appellant assigns five errors related to the alleged ineffective assistance of his two detailed trial defense counsel, Lieutenant (LT) M and LT H.

To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both: (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (additional citation omitted). "We review ineffective assistance of counsel claims *de novo*." *Green*, 68 M.J. at 362 (citations omitted).

When assessing *Strickland's* first prong, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" 466 U.S. at 689. To demonstrate prejudice, "'the [appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Green*, 68 M.J. at 362 (quoting *Strickland*, 466 U.S. at 698) (additional citation omitted). "If we conclude that any error would not have been prejudicial under the second prong of *Strickland*, we need not ascertain the validity of the allegations or grade the quality of counsel's performance under the first prong." *United States v. Saintaude*, 61 M.J. 175, 179-80 (C.A.A.F. 2005) (citing *Strickland*, 466 U.S. at 697) (additional citation omitted).

In determining whether the appellant's factual allegations are true, we are mindful that "Article 66(c) does not authorize a Court of Criminal Appeals to decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *United*

States v. Ginn, 47 M.J. 236, 243 (C.A.A.F. 1997). "Of course, this construction of Article 66(c) does not mean that [we] must ignore affidavits and order a factfinding hearing in all cases involving post-trial claims." *Id.* at 242 (citations omitted). If the facts alleged by the defense would not result in relief under the high standard set by *Strickland*, we may address the claim without the necessity of resolving the factual dispute. *Ginn*, 47 M.J. at 248.

Below, we first discuss the application of *Ginn* to the declarations submitted in this case, and then we consider *Strickland*. We do so in detail for the first claim of ineffectiveness only (the IMC request). After careful consideration of the record of trial, the parties' pleadings, the appellant's declarations under penalty of perjury, and the trial defense counsel's declarations under penalty of perjury, we conclude that the appellant's claims of ineffective assistance of counsel are without merit.

A. Was trial defense counsel ineffective by failing to request LT S as an IMC?

A *DuBay*[2] hearing is not required to decide this assignment of error because we find, under the fourth *Ginn* factor,[3] that even if the factual claims in the appellant's declaration under penalty of perjury are adequate to state a claim on ineffectiveness, the record as a whole "compellingly demonstrate[s]" the improbability of those claims. 47 M.J. at 248; *see also United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968).

The following timeline informs our consideration of this assigned error:

-In early January 2012, LTs M and H were detailed to represent the appellant. The appellant and his trial defense counsel communicated via email regarding his interest in requesting Lieutenant S as IMC. LT M contacted LT S and their mutual superior, Lieutenant Commander C, who both confirmed that LT S would soon be transferring. LT M informed the appellant that LT S "would likely be unavailable" to serve as IMC. Record

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

[3] Our finding of no prejudice below also implicates the first *Ginn* principle, which suggests that a *DuBay* hearing is unnecessary "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor." 47 M.J. at 248.

at 159-65; Appellant's Unsworn Declaration of 21 Jan 2013 at 2; LT M Unsworn Declaration of 9 May 2013 at 1-2.

-On 24 February 2012, the appellant was arraigned. He stated that he understood his right to request an IMC, but was satisfied with and wished to be represented by his detailed counsel, LTs M and H, and that he didn't desire to be represented by any other attorney, military or civilian. Record at 6-7.

-On 4 April 2012, at another pretrial session, a new military judge asked whether there had been "any attempt to procure an individual military counsel, other detailed counsel, or a civilian counsel[,]" and the detailed defense counsel replied that there had not. *Id*. at 15. The appellant then indicated for the second time that he understood his counsel rights, had no questions, wished to be represented by his detailed counsel, LTs M and H, and that he didn't desire to be represented by any other attorney, military or civilian. *Id*. at 16-17.

-On 17 April 2012, the day of trial, the appellant asked the military judge to release his detailed defense counsel due to a lack of communication in the preceding week and requested that LT S be provided as IMC. *Id*. at 128-34, 193-97. He admitted that he had made his decision the day before (16 April 2012). Record at 196; *see also id.* at 133-35, 168-71 (confirming that the appellant's trial-day IMC request arose the day before).

During a colloquy with the military judge the appellant stated that when he met his first detailed defense counsel, she informed him that "[LT S] wasn't readily available [as IMC] because he was due to transfer." *Id*. at 133. In a post-trial declaration, the appellant asserts that after he was informed that LT S "would likely be unavailable" to serve as IMC, he believed that his detailed defense counsel "had done some formal inquiry of some kind and that LT [S] was deemed unavailable." Declaration of 21 Jan 2013 at 2. He also claims that he discussed this issue at other times with his detailed defense counsel, and "each time I believed that LT [S] was unavailable." *Id*.

1. Whether trial defense counsels' failure to route an official IMC request was deficient

Although the appellant discussed his interest in an IMC with his counsel during the early stages of the representation, the record, at best, reflects a miscommunication between the appellant and his detailed defense counsel regarding whether counsel submitted a formal request for LT S to serve as IMC, and as to whether LT S was available to serve as IMC. We must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" and we look to "prevailing professional norms" to set limits on that range. *Strickland*, 466 U.S. at 689-90.

The appellant relies heavily on regulatory language stating that "[a] request for individual military counsel shall be made in writing by the accused, or by counsel for the accused on the accused's behalf, and shall be submitted to the convening authority . . . ." Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0131(c)(1) (26 Jun 2012). But that provision governs how a request should be composed and forwarded once the decision is made to actually request an IMC. Here, the record does not support a conclusion that a decision to seek an IMC was ever made; only that it was discussed.

The appellant failed to mention this purported ongoing issue or any interest in an IMC to the military judge on either 24 February or 4 April;[4] instead he affirmatively expressed his desire to be represented by his two detailed defense counsel. Even when the appellant finally requested an IMC on the day of trial, he did not describe a persistent conflict with his detailed counsel over the issue of IMC, as he now does.[5] The improbability of these recent claims is "compellingly demonstrated" in the record of trial. *Ginn*, 47 M.J. at 248.

Under these facts we cannot conclude that the failure of the trial defense counsel to route an official request for LT S to serve as IMC was deficient given the undisputed, general

[4] The 4 April colloquy is particularly significant because the military judge went off-script and told the appellant that because the trial date was "fast approaching," he should seek any additional counsel immediately if he had an inclination to do so. Record at 17. The military judge warned him that he was not suggesting that the appellant needed another counsel, only that "[l]ast-minute decisions to hire counsel, which throw a wrench in the trial schedule, are frowned upon." *Id.* at 18. The appellant's responses during this exchange indicate that he understood "[a]bsolutely" and [f]ully." *Id*.

[5] In fact, at the conclusion of the court-martial, the appellant requested that LT M receive his copy of the record of trial and staff judge advocate's recommendation. Record at 872-73.

nature of the discussions with the appellant that LT S "would likely be unavailable." *Cf. United States v. Gnibus*, 16 M.J. 844, 846 (N.M.C.M.R. 1982) (interpreting an earlier JAGMAN provision not to require "absolute referral to the commander of the requested counsel simply because a 'claim' is made of an existing attorney-client relationship."), *aff'd*, 21 M.J. 179 (C.M.A. 1985). Any concern that detailed defense counsel thwarted the appellant's legitimate exercise of his statutory IMC right was addressed by the military judge's independent colloquy which, as we have emphasized, occurred multiple times in this case, and during which the appellant repeatedly indicated no questions about his right to an IMC and his explicit desire to be represented by his detailed defense counsel until the day trial was scheduled to commence.

2. Prejudice

Assuming *arguendo* that the performance of the detailed defense counsel was deficient, the appellant has not demonstrated prejudice. We view this scenario as testable for prejudice. *See United States v. Hutchins*, 69 M.J. 282, 292-93 (C.A.A.F. 2011) (holding that errors involving "oversights and omissions in addressing the issue of severance [of counsel] on the part of defense counsel, senior officials in the defense counsel structure, and the military judge" may be tested for prejudice under Article 59(a), UCMJ).[6] The question is whether the appellant has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Green*, 68 M.J. at 362 (quoting *Strickland*, 466 U.S. at 698) (additional citation omitted). The military judge found that both counsel were competent to represent the appellant, and our review of the record convinces us that they performed competently in the face of overwhelming evidence of the

[6] Under circumstances distinguishable from this case, military courts sometimes do not test improper denial of an IMC request for prejudice. In *United States v. Hartfield*, 38 C.M.R. 67, 68 (C.M.A. 1967), where a staff judge advocate did not forward an IMC request to the convening authority, the Court declined to "indulge in nice calculations as to the amount of prejudice" and set aside the findings and sentence. But in doing so, the court quoted from *Glasser v. United States*, 315 U.S. 60, 76 (1942), a decision that pre-dates the test for prejudice imposed by *Strickland*. More recently, in *United States v. Allred*, 50 M.J. 795 (N.M.Ct.Crim.App. 1999), we presumed prejudice from the improper denial of an IMC request, but the denial in that case wrongfully interfered with an existing attorney-client relationship. Since we confront a different situation here, it is proper to follow *Strickland* and Article 59(a), UCMJ, and test for prejudice.

appellant's guilt. The appellant has presented nothing to show that if a request had been forwarded for his desired IMC "the result of the proceeding would have been different"; our confidence in the outcome is not undermined. *Id*.

B. Remaining Ineffective Assistance of Counsel Claims

Although the four additional claims of ineffectiveness rest partially on disputed facts, no further fact-finding is necessary for the following reasons.

With respect to the pretrial investigation, the appellant's claim is entirely speculative and conclusory because it rests on conversations he says that he had with unnamed potential witnesses at unspecified locations and times. *See Ginn*, 47 M.J. at 248 ("[I]f the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis."). Furthermore, we will not "second-guess the strategic or tactical decisions made at trial by defense counsel" with respect to calling witnesses or making objections where it is clear that their overall performance was reasonable under prevailing professional norms, as was the case here. *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (citation omitted).

Likewise, even assuming the appellant's allegations about the clemency submission are true, and that trial defense counsel violated his express desires to withhold submitting matters in clemency until new counsel could be assigned, the appellant has not made a "colorable showing of possible prejudice." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (citations omitted). He has provided no evidence of an attorney-client relationship with LT S, or that he would have hired a civilian counsel. Although in a post-trial declaration the appellant indicates that he spoke twice with a civilian defense counsel about possible representation, "if the price wasn't too steep," he also indicated that he had not retained that attorney. Appellant's Unsworn Declaration of 5 Mar 2013 at 1.

Concerning the substance of his clemency request, the appellant claims that he forbade his counsel from requesting that the CA disapprove all confinement in excess of time served and that he was concerned about taking care of his family and his ability to meet his child support obligations. *Id.* at 2. He claims that during the meeting he had with his trial defense counsel to discuss clemency "it was impossible to think with any type of clarity, mostly due to the lingering effects" of a "very

aggressive anxiety attack" and his placement in Disciplinary Segregation prior to that meeting after learning he may be transferred to a confinement facility in Virginia. *Id*. at 1-2. He claims that he discussed potential financial relief with LT H and was aware that commands are often amenable to financial support for dependents, but that he hadn't decided what relief to request in clemency. *Id*.

Again, the appellant asserts no actual or potential prejudice attributable to the matters submitted in clemency. The submitted request addressed many of the appellant's stated concerns including that he had "two children, one child on the way, a fiancée, and an ailing grandmother whom he is supporting." Clemency Request of 29 May 2012 at 2. In addition, counsel asserted that the appellant had been held almost two years past his End of Active Obligated Service (EAOS) and his desire to "provide for his children and family has already been put on hold, without the excessive 10 month confinement." *Id*. Finally, the appellant has not identified what matters, if any, he would have submitted in clemency or what action in clemency he would have requested. *See United States v. Hood*, 47 M.J. 95, 98 (C.A.A.F. 1997) ("[the appellant] has not met his burden of showing prejudice because he has not identified any matters that he would have submitted [in clemency]."); *United States v. Clemente*, 51 M.J. 547, 552 (Army Ct.Crim.App. 1999).

Notably, the only form of clemency the appellant alludes to contemplating requesting, some form of relief on forfeitures, appears largely illusory since on the date of sentencing, 23 April 2012, the appellant was either beyond his EAOS and not entitled to pay when in confinement, Clemency request at 2, or within two months of his revised EAOS.[7] Thus, the appellant has not carried his burden and we find no reasonable probability that the convening authority would have taken more favorable action toward the appellant. *Hood*, 47 M.J. at 98.

III. Attorney-Client Relationship with LT S

[7] Compare AE XVII at ¶ 1 (In accordance with paragraph 12 of [MILPERSMAN 1160-050], [appellant] is on legal hold for an additional three months beyond his EAOS for criminal processing. His new EAOS is 13 July 2012.") and MILPERSMAN 1160-050 at ¶ 12 ("Members may be extended involuntarily beyond their EAOS as a result of [criminal proceedings] . . . . they may be retained in service for trial and punishment[.]"). Notably, the CA's action is dated 9 August 2012, almost one month after the appellant's EAOS.

On appeal, the appellant summarily alleges that if he had an attorney-client relationship with LT S, his IMC request at trial should have been granted. *See* RULE FOR COURTS-MARTIAL 506(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) and JAGMAN § 0131(d)(2); *see also United States v. Spriggs*, 52 M.J. 235, 240 (C.A.A.F. 2000) (describing the heavy burden on the Government to justify any action that would sever an attorney-client relationship). We agree with the appellant's premise, but it is his burden to prove that he "had a viable ongoing attorney-client relationship regarding the substance of the charges at issue[,]" which involved a "bilateral understanding on the part of both the attorney and the client as to the nature of the services to be provided." *Spriggs*, 52 M.J. at 245. The appellant failed to meet this burden.

To the contrary, he acknowledges that LT S "did advise me at the outset that he was not acting as my attorney," and that LT S later advised him that Lieutenants M and H were assigned as his counsel. Appellant's Unsworn Declaration of 21 Jan 2013 at 2; *see also* Record at 181. Moreover, LT S testified at trial that he had not formed an attorney-client relationship with the appellant, and that he had informed the appellant that he was not his attorney. Record at 164-65. In the absence of any evidence that an attorney-client relationship existed between the appellant and LT S, we find this assignment of error without merit.

IV. Trial-Day Requests for IMC and Severance

The appellant also contends that the military judge abused his discretion when he denied the appellant's trial-day requests to obtain LT S as IMC and to release his detailed counsel, LT M and LT H. Record at 132. Our resolution of the former flows logically from the fact that we have found no attorney-client relationship between the appellant and LT S, and no previous IMC request. We conclude that the military judge did not abuse his discretion by denying the IMC request on the day of trial. *Id*. at 192-93. As previously discussed, the appellant repeatedly indicated no questions about his right to an IMC, did not request an IMC until the scheduled date of trial, and affirmatively waived his right to IMC on at least two occasions well in advance of the date trial was scheduled to commence.

We also find no abuse of discretion in the denial of the request to release detailed counsel. *Id*. at 192-203. "[A] request for substitute counsel is not usually granted where the record of trial shows between an accused and his counsel a

'difference on trial tactics and strategy, and expressed frustration with each other' but it 'does not reflect an irreconcilable conflict or complete breakdown in communication between them.'" *United States v. Lindsey*, 48 M.J. 93, 98 (C.A.A.F. 1998) (quoting *United States v. Swinney,* 970 F.2d 494, 499 (8th Cir. 1992) (additional citation omitted). As in *Lindsey,* the record reflects vague last-minute claims about his counsel which even the appellant characterized as "small miscommunications" about scheduling and the handling of witnesses. Record at 170, 194. The appellant acknowledged that he had no reason to doubt his attorneys' competence, *id*. at 193, and the record does not reflect a "breakdown" in communication at any point, even after the appellant raised this issue. He may not have continued to enjoy the same relationship with his counsel after that point, but the military judge did not abuse his discretion when he found no good cause for severance. *United States v. Mackmore*, 2009 CCA LEXIS 61, *8-9 (N.M.Ct.Crim.App. 2009) (finding no abuse of discretion where appellant's last-minute request for severance was similarly focused on plea negotiations, preparation, and trial tactics).

To the extent that the appellant separately challenges the military judge's refusal to grant a continuance, we find that the military judge properly analyzed the factors articulated in *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997) and was within his discretion to deny the continuance.

V. Did the military judge violate the appellant's Due Process Rights by ordering cessation of prescription narcotics resulting in pain and narcotic withdrawal such that he could not effectively participate in his defense?

On appeal, the appellant contends that the effects of narcotic withdrawal were so debilitating that he was unable to effectively participate and assist in his own defense. He also claims that the memory issues that led to his inability to assist counsel were so obvious that the military judge should have *sua sponte* ordered an R.C.M. 706 hearing during the course of trial. We disagree.

The appellant was lawfully prescribed medications including Valium, Percocet, Vicodin, Naproxen, Robaxin, and Motrin, to treat back pain. Record at 213; AE-XXXIV. On 18 April 2012, the military judge noted concern about the effects of such medications during the court-martial proceedings and directed the defense to ensure that the appellant was "not on any narcotic medication" including Percocet, Vicodin, and Valium.

Record at 214. At that time, the military judge indicated that he would "take all efforts" to allow sufficient "health and comfort recesses," and encouraged the appellant to inform his counsel if he needed any additional breaks. *Id*. Neither the appellant nor trial defense counsel raised concerns regarding the military judge's direction.

On 20 April 2012, the members announced findings, and later that evening the appellant checked himself into a hospital for an accumulation of withdrawal issues. *Id*. at 730, 732. The treating physician discussed his withdrawal symptoms, offered his opinion that the appellant's knowledge and understanding were not "greatly impaired," and that the appellant was "very straightforward" and displayed "his ability to respond to and answer my questions [clearly]." *Id*. at 758. The appellant presented hospital "Discharge Instructions," AE-XXXIV, which indicated he was suffering from narcotic withdrawal and that symptoms "last 3-5 days[.]" The military judge then recessed the court until 23 April 2012, in order for appellant to prepare for sentencing. *Id*. at 765.

The military judge also extensively queried counsel, who stated that nothing in their investigation or interactions with the appellant indicated he was incompetent at the time of the alleged offenses or unable to assist in his defense at trial. Record at 741-42; 749-751, 772-73, 775-77. The military judge also stated his observations of the appellant's demeanor, lucidity, intelligence and visible indicators of physical pain for the record. *Id*. at 214-15, 764-65, 778.

Finally, the appellant responded to questions from the military judge and described narcotic withdrawal symptoms, his 20 April hospital visit, and his participation in his defense at trial. *Id*. at 734-736. The appellant acknowledged that he "would have liked to have been better [mentally]," Record at 736, and indicated that he had been treated for "depression," but acknowledged he understood what was going on throughout the trial, *id.* at 737-740, 743-45.

Discussion

"A military judge can presume, in the absence of contrary circumstances, that the accused is sane and . . . that counsel is competent." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citation omitted). "A military judge has the authority to order a sanity board after referral under R.C.M. 706 if it appears there is reason to believe the accused lacked

mental responsibility at the time of a charged offense or lacks the capacity to stand trial." *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008) (citing R.C.M. 706(a),(b)(2)). Because mental competence is a question of fact, a military judge's determination will only be overturned on appeal if it is clearly erroneous. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993).

Although the record reflects that the appellant suffered withdrawal symptoms, there is essentially no evidence to rebut the presumption of sanity. *Riddle*, 67 M.J. at 338. At trial, the appellant stated that he "would have liked to have been better [mentally]," Record at 736, but acknowledged his understanding of what was going on throughout the trial, *id*. at 737-40, 743-45. Medical records reviewed by the military judge reflected that the appellant previously been diagnosed as depressed, but raised no issue as to competence to participate in his defense. Observations of trial defense counsel, trial counsel and the military judge were uniform: there was no reason to believe the accused lacked mental responsibility at the time of the charged offenses or mental capacity at the time of trial. Therefore, the military judge had no duty to order a sanity board under R.C.M. 706.

Moreover, the record simply does not support the appellant's assertion that the military judge's order to refrain from narcotic use while trial was in session violated any Constitutional right or prevented him from cooperating intelligently in his defense. Although the appellant occasionally displayed symptoms of pain or discomfort, all parties observed that he was actively engaged in assisting and cooperating in his own defense. This assignment of error is without merit.

VI. Admission of Prosecution Exhibit 19

The appellant argues that the military judge abused his discretion when he admitted Prosecution Exhibit 19 into evidence in violation of the requirements of MILITARY RULE OF EVIDENCE 902(11), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.): specifically, that the business record was not self-authenticating, because it was not "accompanied by a written declaration of its custodian . . . in a manner complying with any Act of Congress or rule prescribed by the Supreme Court[.]" *Id*.

We conclude that the military judge did not abuse his discretion. *United States v. Clayton*, 67 M.J. 283, 286

(C.A.A.F. 2009). The bank records admitted as PE 19 duplicate records also admitted as PE 24, with the exception of the disputed "written declaration of" a custodian of those records. Record at 33, 35, 438-39. As such, the notarized statement by the records custodian marked as page 3 of PE 24 also satisfies the requirements of MIL. R. EVID. 902(11) with respect to PE 19.

VII. Larceny: Legal and Factual Sufficiency

On the basis of the record before us, and considering the evidence in the light most favorable to the Government, a reasonable fact finder could have found all the essential elements of the charged larceny beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt of stealing more than $500.00 worth of currency, property of the Association. *Turner*, 25 M.J. at 325.

We find the evidence of the appellant's intent to permanently deprive the Association of its funds overwhelming. The appellant transferred money from the Association's Navy cash card ("the Association's card") to his personal cash card for his own personal use, instructed an Association officer not to report the Association's card as missing, and misinformed that officer about more than $4,000 worth of purchases. The record also reflects that the appellant used the Association's card to make personal purchases on board REAGAN, and purchased money orders to pay his personal publicist for a feature story about his life and his budding commercial enterprise. The evidence overwhelmingly supports a conclusion that the appellant intended to permanently deprive the Association of its funds, notwithstanding his attempts once his misdeeds were discovered to partially reimburse the Association.

VIII. Sentence Appropriateness

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005).

IX. Conclusion

We find the appellant's remaining assignments of error to be without merit. Accordingly, the findings and the sentence, as approved by the CA, are affirmed.

Chief Judge MODZELEWSKI and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court