

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

**Before  
E.S. WHITE, D.E. O'TOOLE, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CLAYTON A. CHAFFIN  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200500513  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 08 April 2004.

**Military Judge:** LtCol Jeffrey Colwell, USMC.

**Convening Authority:** Commanding General, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol A.G. Peterson, USMC; **Addendum:** LtCol J.L. Gruter, USMC.

**For Appellant:** LT Kathleen Kadlec, JAGC, USN.

**For Appellee:** CDR M.G. Miller, JAGC, USN; LT Craig Poulson, JAGC, USN.

**20 March 2008**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

WHITE, Senior Judge:

This case is before us a second time, following remand for a rehearing or sentence reassessment.

Previously, this court set aside findings of guilty to wrongful use of marijuana and distribution of cocaine (Specifications 1 and 3 of Charge III), and affirmed the

remaining findings of guilty.<sup>1</sup> We set aside the sentence, and returned the case to the Judge Advocate General for remand to an appropriate convening authority. The convening authority was authorized to order a rehearing on the affected specifications and the sentence, to dismiss the affected specifications and order a rehearing on sentence alone, or to dismiss the affected specifications and reassess the sentence. *United States v. Chaffin*, No. 200500512, 2007 CCA Lexis 47, unpublished op. (N.M.Ct.Crim.App. 22 Feb 2007).

On 7 June 2007, the convening authority dismissed the affected charge and specifications, and reassessed the sentence. He approved only so much of the sentence as extended to 18 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant now assigns four supplemental errors.<sup>2</sup> First, he contends he was prejudiced by "spill over" from improper comments by the trial counsel during opening statement,<sup>3</sup> from the testimony of a witness<sup>4</sup> on Specification 11 of Charge V, which specification the convening authority later dismissed, and from Prosecution Exhibits 5 and 6, which this court ruled inadmissible in its prior decision. Second, he argues post-trial delay has denied him due process. Third, he asserts the post-trial delay affects the sentence that should be affirmed under Article 66, UCMJ, and asks this court not to affirm the bad-conduct discharge. Fourth, the appellant contends the reassessed sentence is inappropriately severe, and more severe

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<sup>1</sup> The court affirmed the findings of guilty to Specifications 10, 12, and 13 of Charge V and to Charge V, and to Additional Charge II and the sole specification thereunder. The appellant was acquitted of Charge I and the specifications thereunder, Charge II and the sole specification thereunder, Specification 5 of Charge III, Charge IV and the specifications thereunder, Specifications 1-9 and 14 of Charge V, Additional Charge I and the sole specification thereunder, and Additional Charge III and the sole specification thereunder. The convening authority set aside the findings of guilty to, and dismissed, Specifications 2 and 4 of Charge III and Specification 11 of Charge V.

<sup>2</sup> The appellant originally assigned four errors, all of which were resolved by the court's earlier decision.

<sup>3</sup> The appellant cites a statement by the trial counsel that the Government's evidence would show the appellant had used and distributed illegal drugs during a break in service between enlistments. The judge permitted the trial counsel to make the objected-to statement, but later ruled evidence of that fact inadmissible.

<sup>4</sup> Mr. William Wallace.

than that which would have been imposed if the erroneous admission of Prosecution Exhibits 5 and 6 had not occurred.

We have examined the record of trial, the appellant's four supplemental assignments of error and brief, and the Government's answer. We have previously affirmed the findings. We now find the sentence is correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. See Arts. 59(a) and 66(c), UCMJ.

### **Spillover**

The appellant asks this court to set aside the remaining findings of guilty, arguing those convictions were influenced by "spillover." Although he could have, the appellant did not raise this issue as a separate assignment of error when his case first came before this court.<sup>5</sup> Because the appellant has failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider this issue, we hold the appellant has waived this issue. Alternatively, this issue was necessarily decided against the appellant when this court previously affirmed the remaining findings of guilty.

Piecemeal litigation is "counterproductive to the fair, orderly judicial process created by Congress in Articles 66 and 67, UCMJ." *Murphy v. Judges of United States Army Court of Military Review*, 34 M.J. 310, 311 (C.M.A. 1992). It can undermine the finality of judgments, needlessly extend resolution of the case, and burden scarce judicial resources. See *McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991)(citations omitted). Further, a service court of criminal appeals "cannot effectively carry out its . . . review of . . . cases unless all issues known to or reasonably discoverable by appellant are litigated before that court in its initial review of the case." *Murphy*, 34 M.J. at 311.

Principles of waiver and forfeiture provide the necessary incentive to litigants and counsel to raise issues in a timely fashion and to avoid piecemeal litigation. See *Freytag v.*

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<sup>5</sup> The appellant did, however, partially argue spillover in support of his third original assignment of error. At that time, he asked the court to dismiss Specifications 1 and 3 of Charge III, Specification 10 of Charge V, and Additional Charge II, due to the trial counsel's improper remarks during opening statement, the improper admission of Prosecution Exhibits 5 and 6, and the insufficiency of the evidence. He did not raise the allegedly prejudicial effect of Mr. Wallace's testimony, nor did he argue for dismissal of Specifications 12 and 13 of Charge V.

*Commissioner*, 501 U.S. 868, 895 (1991)(Scalia, J., concurring in part and in the judgment); *United States v. Frady*, 456 U.S. 152, 163 (1982); *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993); *United States v. Shavrnoch*, 47 M.J. 564, 566-68 (A.F.Ct.Crim.App. 1997), *aff'd in part & set aside in part on other grounds*, 49 M.J. 334 (C.A.A.F. 1998). Such principles are routinely applied at the trial level, and are familiar to appellate counsel reviewing records of trial.<sup>6</sup> As well, such principles are implicit in the COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE, 44 M.J. LXIII, 32 C.F.R. Part 150 (2007). Those rules establish deadlines for the submission of assignments of error, and require leave of court to file briefs and motions out of time. CCA RULES 15 and 23.

On the other hand, just as the Plain Error Doctrine permits the court to address evidentiary errors not objected to at trial, the interests of justice and the dictates of Article 66, UCMJ, require that any forfeiture rule for issues not timely raised on appeal must also have exceptions. Article 66, UCMJ, commands us to affirm only such findings and sentence as we find correct in law and fact, and determine, on the basis of the entire record, should be approved. That mandate requires this court to look beyond those issues raised by the appellant, and ensure justice is done. The appellate court rules, likewise, permit the court to grant enlargements and leave to file out of time, as well as to suspend the rules. CCA RULES 23, 24 and 25.

The avoidance of piecemeal litigation and our Article 66 mandate are easily reconciled by adopting, as the standard for determining when not to apply forfeiture, the "cause and prejudice" standard used by the United States Supreme Court in its procedural default and habeas corpus jurisprudence. See *McCleskey*, 499 U.S. at 493; *United States v. Simoy*, No. 30496, 2000 CAA LEXIS 183, unpublished op. (A.F.Ct.Crim.App. 7 Jul 2000), *aff'd*, 54 M.J. 407 (C.A.A.F. 2001).

The cause and prejudice standard requires a litigant to show "some objective factor external to the defense impeded counsel's efforts" to raise the claim in a timely manner. *McCleskey*, 499 U.S. at 493 (quoting *Murray v. Carrier*, 477 U.S.

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<sup>6</sup> See, e.g. RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)(challenge for cause), R.C.M. 910(j)(factual issues waived by guilty plea); R.C.M. 405(k)(objection to pretrial investigation); R.C.M. 707(e)(speedy trial); R.C.M. 801(g)(failure to timely raise defenses, objections & motions); MILITARY RULE OF EVIDENCE 103(a) MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)(evidentiary errors only preserved by objection); MIL. R. EVID. 311(i)(guilty plea waives 4th Amendment errors).

478, 488 (1986)). Cause can be established by showing, *inter alia*, official interference preventing compliance with procedural rules, that "the factual or legal basis for a claim was not reasonably available to counsel," or that counsel was constitutionally ineffective. *Id.* at 494 (quoting *Carrier*). In addition to showing cause, the appellant must also show actual prejudice resulting from the error. *Id.* (quoting *Frady*, 456 U.S. at 168 (internal quotations omitted)). Alternatively, a litigant may show that a constitutional violation probably caused an innocent person to be convicted, resulting in a fundamental miscarriage of justice. *Id.* (citing *Carrier*, 477 U.S. at 485).<sup>7</sup>

In this case, the appellant has shown neither cause and prejudice nor that manifest injustice would result if the court does not consider his first supplemental assignment of error. The facts and law necessary to raise prejudicial spillover were known when this case first came before the court, yet it was not assigned as an error. Even if it were not until after the court had ruled Prosecution Exhibits 5 and 6 erroneously admitted that the spillover argument first crystallized for the appellant -- which is clearly not the case, since he alluded to spillover in his argument on the third original assignment of error -- the appellant could have then sought reconsideration of our decision affirming the remaining findings. He did not. Nor has the appellant clearly shown he was prejudiced by spillover, where the military judge correctly instructed the members on spillover,<sup>8</sup> the members acquitted the appellant on a number of specifications,<sup>9</sup> and there was adequate independent evidence to find the appellant guilty of the remaining specifications.

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<sup>7</sup> Former Chief Judge Crawford of our superior court has referred to this showing as one of "manifest injustice." *United States v. Johnson*, 42 M.J. 443, 447 (C.A.A.F. 1995)(Crawford, J. concurring in the result).

<sup>8</sup> Record at 1018; Appellate Exhibit LXXIII at 23-25. Absent evidence to the contrary, we presume members follow the military judge's instructions, *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). "[P]roperly drafted and delivered instructions are sufficient to prevent juries from cumulating evidence, thus avoiding improper spill-over." *United States v. Myers*, 51 M.J. 570, 579 (N.M.Ct.Crim.App. 1999)(citing *United States v. Duncan*, 48 M.J. 797, 803 (N.M.Ct.Crim.App. 1998)).

<sup>9</sup> Although charged with 31 separate specifications under eight separate charges, the members convicted the appellant on only nine specifications. Of the 12 drug-related specifications, the members acquitted the appellant of three.

Alternatively, we conclude the court has already decided the question presented by the appellant's first supplemental assignment of error. The court's earlier decision specifically stated the court was satisfied the appellant had not been harmed by the trial counsel's comments during opening statement. *Chaffin*, unpublished op., at 5 n.7. Further, in previously contending there was insufficient evidence on specification 10 of Charge V and Additional Charge II, the appellant argued that the erroneously-admitted Prosecution Exhibits 5 and 6 had contributed to his conviction. Nevertheless, the court held the evidence was legally and factually sufficient. *Id.* at 5. Finally, the court's decision affirming the findings of guilty to the remaining charges and specifications necessarily implied the conclusion that the appellant had not been materially prejudiced by improper evidentiary spillover. We decline to revisit them.

### **Post-Trial Review**

In his second and third supplemental assignments of error, the appellant alleges the delay in completing appellate review has denied him due process and affects the sentence that should be affirmed under Article 66, UCMJ.<sup>10</sup> He specifically points to the 154 days between adjournment of the court-martial and authentication of the record of trial, and to the 681 days between the original docketing of the case with this court and our earlier decision.<sup>11</sup>

"[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and

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<sup>10</sup> Although the appellant did not raise post-trial delay in his initial assignments of error, we will nonetheless consider these two supplemental assignments on their merits. First, relevant facts have changed; the post-trial delay is now greater than it was when the appellant filed his original assignments of error. Second, had it been raised originally, the court would have declined to decide the issue at that time as unripe, given the decision the case needed to be returned to the convening authority for either rehearing or sentence reassessment.

<sup>11</sup> The latter delay, the appellant says, is "unreasonable, unexplained and can only be attributed to gross negligence." Appellant's Supplemental Brief and Assignment of Errors of 20 Jul 2007 at 14. Examination of the record, however, reveals that 517 of those 681 days were spent waiting for the appellant to file his initial brief and assignment of errors. Once the appellant filed his brief and assignment of errors, this court issued its decision in 164 days. While, in hindsight, it may not have been prudent to have accommodated the appellant's counsel by granting their nine requests for enlargement of time, we cannot agree with the appellant that doing so was grossly negligent, or that the length of time his case was pending before the court is unexplained.

appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). The appellant here has not identified any specific harm from the delay, nor do we find any. He has not suffered oppressive incarceration pending the resolution of his appeal.<sup>12</sup> He has not alleged any anxiety or concern beyond that normal for people awaiting appellate decisions. As the convening authority dismissed Specifications 1 and 3 of Charge III and we affirmed the remaining findings of guilt, there is no danger his defense has been impaired by the delay.

Accordingly, we conclude any denial of due process was harmless beyond a reasonable doubt. Further, we find the delay in this case is not so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. See *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Finally, having considered the factors set out in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we decline to reduce the sentence pursuant to our authority under Article 66, UCMJ. See *Toohey*, 63 M.J. at 363; *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

### **Sentence Appropriateness**

In his fourth supplemental assignment of error, the appellant asserts his sentence to 18 months confinement is inappropriately severe, and argues a sentence of 10 months confinement is more appropriate. We disagree.

"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.

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<sup>12</sup> According to the appellant's clemency submission of 16 May 2007, he was released from confinement on 3 March 2005, 329 days after conclusion of his trial. LT A. Souders Ltr of 16 May 07 at 1. Even if this case had proceeded in strict accordance with the timelines established in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), it is highly doubtful our initial decision, or the convening authority's sentence reassessment, would have taken place before the appellant was released from confinement.

1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In this case, the appellant, a noncommissioned officer, was found guilty of repeatedly soliciting junior Marines to use and possess drugs. The specifications of which the appellant now stands convicted carry a maximum punishment of 14 years confinement. They are offenses with serious ramifications for military good order, discipline and readiness. Based on the entire record, we find the appellant's sentence is not inappropriately severe, and conclude it is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Snelling*, 14 M.J. at 268; see Art. 66(c), UCMJ.

Further, we conclude that, absent the prejudicial error necessitating the sentence reassessment, the sentence would have been at least as severe as that approved by the convening authority on 8 June 2007. See *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000); *United States v. Sales*, 21 M.J. 305, 307-08 (C.M.A. 1986); R.C.M. 1107(e)(1)(B)(iv).

#### **Conclusion**

We have previously affirmed the findings of guilty. We now affirm the sentence, as approved by the convening authority on 8 June 2007.

Judge O'TOOLE and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court