

United States Navy - Marine Corps  
Court of Criminal Appeals

UNITED STATES  
Appellee

v.

Khile F. JONES  
Airman Apprentice (E-2)  
U. S. Navy  
Appellant

NMCCA No. 201900166

Special Panel 3

ORDER

*Remanding Case for  
New Post-Trial Processing*

On 6 August 2019, Appellant submitted the following assignment of error to this Court:

*Should the Court order remand for new post-trial processing where another Sailor's deferral request was attached to Appellant's record and Appellant was afforded no opportunity to respond, prejudicing his right to an informed review by the Convening Authority and undermining his best chance at post-trial relief?*

Appellant avers that, prior to taking action, the convening authority (CA) considered another Sailor's deferment request from an unrelated case, that this deferment request constituted new adverse matter, and that Appellant was deprived of his rights to be notified and to rebut new adverse matter, resulting in prejudice to his right to an informed post-trial review by the CA and undermining his best chance at post-trial relief. The government counters that the matters in the deferment request were not adverse to Appellant, and regardless, were so trivial as to be non-prejudicial, particularly where Appellant waived his right to request clemency. We find prejudice, set aside the CA's action, and remand for new post-trial processing.

The CA stated in his promulgating court-martial order that he had previously denied Appellant's request to defer Appellant's adjudged reduction in pay grade.<sup>1</sup> The CA further noted that matters related to Appellant's deferment request were attached to the record of trial. In fact, Appellant submitted no

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<sup>1</sup> CA's promulgating Court-Martial Order at 3.

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such deferment request or any matters pursuant to Rules for Courts-Martial (R.C.M.) 1105-1106, Manual for Courts-Martial, United States (2016 ed.).<sup>2</sup>

The deferment request originated from an unrelated court-martial and was submitted by another Sailor who happened to have the same last name as Appellant. The deferment request included a stipulation of fact, trial results, and evidence of debt – all from the other Sailor’s unrelated case. These matters detail the other Sailor’s multiple drug offense convictions (wrongful distribution and/or use of various drugs including MDMA, LSD, amphetamines, methamphetamines, and psilocybin mushrooms) as well as two obstructions of justice.

We review post-trial processing error de novo, as a question of law. *United States v. Lajoie*, \_\_ M.J. \_\_, NMCCA No. 201800162 (N-M Ct. Crim. App. 27 Nov 2019) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

When taking action, should the CA consider matter adverse to an accused from outside the record, “the accused shall be notified and given an opportunity to rebut.” R.C.M. 1107(b)(3)(B)(iii). On appeal, Appellant bears the burden to “demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter.” *United States v. Chatman*, 46 MJ 321, 323 (C.A.A.F. 1997) (citation and internal quotation marks omitted). Due to the highly discretionary nature of the CA’s clemency review, the threshold to establish prejudice is low and we will grant relief if Appellant makes “some colorable showing of possible prejudice.” *Id.* at 323-324, (citation and internal quotation marks omitted); *see also Kho*, 54 M.J. at 65; *United States v. Wheelus*, 49 M.J. 283, 288-289 (C.A.A.F. 1998).

We find Appellant has met his low threshold to establish “some colorable showing of possible prejudice.” Appellant states with specificity what “would have been submitted to deny, counter or explain” the deferment request had he been afforded an opportunity to respond – the deferment request came from another Sailor in a different case and should not be considered by the CA when taking action in Appellant’s case.<sup>3</sup> That another Sailor’s deferment request from an unrelated case constitutes new matter from outside the record is obvious on its face. We have no trouble concluding that this new matter was adverse to Appellant and of a non-trivial nature in light of the deferment request’s detailed account of extensive misconduct *committed by another Sailor*.

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<sup>2</sup> Trial Defense Counsel’s Acknowledgement of Service of 7 May 2019.

<sup>3</sup> Appellant’s Brief and Assignment of Error at 9.

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Accordingly, it is, by the Court, this 4th day of December 2019,

**ORDERED:**

1. That the CA's action dated 21 May 2019 is hereby **SET ASIDE**.
2. That the record of trial is returned to the Judge Advocate General for submission to an appropriate CA for preparation of a new Staff Judge Advocate's Recommendation and new CA's action in compliance with R.C.M. 1106-1107.
3. That thereafter the record will be returned to this Court for completion of appellate review.



FOR THE COURT:

A handwritten signature in blue ink, appearing to read "Rodger A. Drew, Jr.", with a stylized flourish at the end.

RODGER A. DREW, JR.  
Clerk of Court

Copy to:  
NMCCA (51.3)  
45 (CDR Evans)  
46 (Maj Wiggins; LT Ceder)  
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