United States Navy-Marine Corps Court of Criminal Appeals

UNITED STATES
Appellee

v.

Edward C. LIN
Lieutenant Commander (O-4), U.S. Navy
Appellant

No. 201700303

Appeal from the United States Navy-Marine Corps Trial Judiciary.

Decided: 15 April 2019.

Military Judges:
Captain Charles N. Purnell II, JAGC, USN (arraignment);
Commander Robert Monahan, JAGC, USN (trial).

Sentence Adjudged: 6 June 2017 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of a military judge sitting alone. Sentence approved by convening authority: forfeiture of all pay and allowances, confinement for nine years, and a dismissal.[1]

For Appellant:
Larry Younger, Esq.;
Captain Thomas R. Fricton, USMC.

For Appellee:
Major Kelli A. Oneil, USMC;
Captain Brian L. Farrell, USMC.

---

[1] The Convening Authority suspended confinement in excess of six years pursuant to a pretrial agreement.

PUBLISHED OPINION OF THE COURT

Before WOODARD, HUTCHISON, and CRISFIELD,
Appellate Military Judges.

Chief Judge WOODARD delivered the opinion of the Court, in which Senior Judge HUTCHISON and Judge CRISFIELD joined.

WOODARD, Chief Judge:

The appellant was convicted, consistent with his pleas, of three specifications of violating a lawful general order, two specifications of making false official statements, and two specifications of willfully communicating information relative to the national defense of the United States to a person not entitled to receive it, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 907, and 934.[2]

On appeal, the appellant raises three assignments of error: (1) he was denied his right to a speedy trial as required by Article 10, UCMJ; (2) the military judge abused his discretion by admitting into evidence as aggravation damages caused by his misconduct that were hypothetical in nature; and (3) his sentence was inappropriately severe. Although not raised by the parties, we find that the Court-Martial Order (CMO) contains error and direct corrective action in our decretal paragraph. After careful consideration of the entire record, we find no merit in the assigned errors and affirm the findings and sentence.

I. BACKGROUND

On 11 September 2015, as the appellant was about to board a flight from Honolulu to the People's Republic of China, agents from the Naval Criminal Investigative Service (NCIS) and the Federal Bureau of Investigation (FBI) arrested the appellant. At the time of his arrest, the appellant had been the subject of a fifteen-month-long counterintelligence investigation. Prior to attempting to board his China-bound flight, law enforcement officers discovered that the appellant had concealed his true destination from his command by

---

[2] The two Article 134, UCMJ, specifications of willfully communicating information relative to the national defense of the United States were charged as violations of 18 U.S.C. § 793(d).

completing a false leave request form indicating that he would be traveling to Alexandria, Virginia, his home of record.

The counterintelligence investigation also revealed that this was not the first time the appellant concealed foreign travel from his command. In October 2013, after requesting and receiving leave to travel to Alexandria, Virginia, the appellant instead traveled to Taiwan. Prior to traveling to Taiwan, the appellant had arranged to meet with a senior Taiwanese military officer and several other Taiwanese officers of lesser rank.

Upon being taken into custody, the appellant was questioned, amongst other things, about his planned activities in China. Over the course of two days of questioning, which was recorded by law enforcement, he explained that he planned to meet a local national female, whom he had met on an online dating site and whom he knew to be a Chinese government employee.

The appellant also admitted that, despite not disclosing them to his command security officer, he had close relationships with several foreign persons, including several registered foreign agents and some he believed to be foreign agents. He corresponded and conversed with these foreign agents about United States policy and positions. He was particularly open in his communications with two women with whom he conversed. With these women, he shared classified information concerning operational plans, policies, missions, and capabilities of the United States military.

Unbeknownst to the appellant, one of the women he believed to be a foreign agent and with whom he communicated and shared classified information was actually an undercover United States law enforcement counterintelligence agent. As part of the investigation, the undercover agent recorded approximately 10 hours of conversations with the appellant, a substantial portion in Mandarin Chinese.

The appellant's mishandling of classified information, however, was not limited to his discussions with these women. He also mishandled classified documents. While returning on a commercial flight from a deployment in February 2015, the appellant placed classified materials in his checked bags. A Department of Homeland Security officer found the classified documents while conducting an inspection of the appellant's checked luggage and confronted the appellant about the documents. The appellant admitted to failing to maintain proper security of the classified documents, asked the officer to dispose of the documents, and left the documents with the officer. The appellant admitted that he did not know whether the officer had the required clearance to view or possess the classified documents. The appellant failed to inform his command of this compromise of classified documents. Additionally, classified materials were also discovered at the appellant's home during a search.

The appellant was placed into pretrial confinement on 11 September 2015, the day he was apprehended attempting to board a flight to China. Following his apprehension, the appellant spent 249 days in pretrial confinement before his arraignment, and a total of 630 days before his sentence was announced. Additional facts necessary for the resolution of the issues raised will be discussed below.

II. DISCUSSION

A. Speedy Trial

At trial, the appellant filed a motion to dismiss with prejudice the charges against him due to the government's violation of his RULE FOR COURTS-MARTIAL (R.C.M.) 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) and Article 10, UCMJ, right to a speedy trial. Finding that the government had complied with the requirements of both R.C.M. 707 and Article 10, UCMJ, the military judge denied the appellant's motion to dismiss. In denying the motion, the military judge issued a 19-page written ruling addressing his essential findings of fact and conclusions of law. On appeal, the appellant again asserts that the government violated his Article 10, UCMJ, right to a speedy trial by failing to exercise reasonable diligence to bring him to trial following his arrest.[3] However, unlike his complaint at trial where he argued the government's lack of diligence only extended to the date of his arraignment, on appeal he now asserts that the government's lack of diligence extended to the date his sentence was announced. We conclude that the government was diligent in bringing the appellant to trial and that the appellant's unconditional guilty plea waived any post-arraignment speedy trial violation claim.

The appellant's guilty plea was unconditional.[4] Generally, an unconditional guilty plea "waives any speedy trial issue as to that offense." R.C.M. 707(e); *see United States v. Tippit,* 65 M.J. 69, 75 (C.A.A.F. 2007). However, Article 10, UCMJ, "provides a narrow exception to the normal rule that a speedy trial motion is waived by an unconditional guilty plea." *Id.* (citing *United States v. Mizgala,* 61 M.J. 122, 126 (C.A.A.F. 2005)). A speedy trial

---

[3] On appeal, the appellant does not raise any error related to the military judge's R.C.M 707 ruling.

[4] *See* Record at 704.

claim under Article 10, UCMJ, is not waived by a subsequent guilty plea when an appellant litigates that claim at trial. *Id.* at 127.

Article 10, UCMJ, provides:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

Whether the appellant's Article 10, UCMJ, right to a speedy trial has been violated is a question of law we review *de novo*, "giving substantial deference to a military judge's findings of fact that will be reversed only if they are clearly erroneous." *Mizgala,* 61 M.J. at 127 (citing *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003); *United States v. Doty,* 51 M.J. 464, 465 (C.A.A.F. 1999)).

1. Waiver of post-arraignment claim

At trial, the appellant focused his unsuccessful speedy trial claim on the period of time from his arrest to arraignment—11 September 2015 to 17 May 2016—and did not later reassert his claim based on any post-arraignment delay before entering his unconditional guilty plea. Although it is well-settled law that the government's speedy trial obligations do not terminate at arraignment, *Cooper,* 58 M.J. at 61, as an initial matter, we first consider whether the appellant limited his claim at trial to just pre-arraignment delay. If he did, then we must determine if by doing so, he waived appellate review of any new Article 10, UCMJ, claims attacking the government's lack of diligence post-arraignment.

We find the appellant limited his Article 10, UCMJ, claim at trial to the period of time between his arrest and his arraignment. In accordance with the agreed upon Trial Management Order, the appellant filed his motion to dismiss on speedy trial grounds on 26 June 2016. The motion was litigated on 9 August 2016. During the proceedings on the motion, the military judge correctly noted that the "Article 10 concern runs to the date of trial, not merely to arraignment."[5] When questioned by the military judge whether the defense had any post-arraignment speedy trial concerns, the appellant's defense counsel stated that he did not have any speedy trial concerns post-

[5] Record at 363-25. We note that due to the many classified proceedings in this case that the trial transcript page numbering system often involved a hyphenated page numbering format.

arraignment.[6] The defense counsel also acknowledged that the defense had not previously voiced any objection to any post-arraignment excludable delay granted.[7] And he acknowledged that the defense "could renew [the Article 10, UCMJ,] motion . . . if we have new evidence of . . . delay or lack of due diligence on the part of the government in proceeding to trial. I don't have that at this time."[8] On 12 August 2016, the military judge rendered his written ruling denying the speedy trial motion. In his ruling the military judge specifically found that the appellant had limited the motion to the time between apprehension and arraignment.[9] At no time following the issuance of the military judge's ruling did the appellant make any further speedy trial violation claims prior to the adjournment of his court-martial.

As stated by the court in *Mizgala,* an appellant's unconditional guilty plea does not waive "his right to contest the military judge's denial of *his Article 10 motion* on appeal." *Mizgala,* 61 M.J. at 127 (emphasis added). Further, as this court has previously opined, *Mizgala* stands for the proposition that only those Article 10, UCMJ, issues *litigated at trial* survive a waiver stemming from an unconditional guilty plea. *United States v. Dubouchet,* 63 M.J. 586, 588 (N-M. Ct. Crim. App. 2006). Here, by raising it and litigating it at trial, the appellant's Article 10, UCMJ, speedy trial claim preserved for appellate review was his *pre-arraignment* claim. By failing to raise or litigate his newly asserted *post-arraignment* speedy trial claims at trial, we conclude that appellant's unconditional guilty plea has, like it did in *Dubouchet,* waived appellate review of *that* issue. *See id.* Accordingly, we will focus our review on the Article 10, UCMJ, speedy trial violation claim made by the appellant and denied by the military judge at trial, and analyze the appellant's claim under the factors articulated in *Barker v. Wingo,* 407 U.S. 514 (1972).

2. Barker analysis of preserved pre-arraignment claim of error

When an accused is in pretrial confinement, Article 10, UCMJ, does not demand "constant motion," but does impose on the government the standard of "reasonable diligence in bringing the charges [lodged against him or her] to trial." *Mizgala*, 61 M.J. at 127 (citation omitted). In assessing whether the government has acted with "reasonable diligence in proceeding to trial," our

---

[6] *Id.* at 363-25.

[7] *Id.* at 363-23.

[8] *Id.* at 363-26.

[9] AE LIV at 15.

superior court has held that the four factors identified by the Supreme Court in *Barker* "are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala,* 61 M.J. at 127 (citations omitted). The four *Barker* factors are: "(1) the length of delay; (2) the reasons for the delay; (3) whether appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Schuber,* 70 M.J. 181, 188 (C.A.A.F. 2011) (citation omitted).

Upon review, we find the military judge's findings of fact in support of his decision denying the appellant's Article 10, UCMJ, speedy trial claim are supported by the record, not clearly erroneous, and we adopt them as our own.[10]

a. Length of delay

The initial question is whether the 249-day delay between the initiation of the appellant's pretrial confinement and his arraignment was unreasonable. In determining how *Barker's* first factor affects our inquiry, "we consider the particular circumstances of the [appellant's] case because 'the delay that can be tolerated for an ordinary street crime is considerably less'" than that which can be tolerated for more serious, complex cases. *United States v. Cooley,* 75 M.J. 247, 260 (C.A.A.F. 2016) (quoting *Barker,* 407 U.S. at 531). The length of the delay has been described by our superior court as a "triggering mechanism" for a speedy trial review and can be dispositive. *Cooley,* 75 M.J. at 260 (citing *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007)). When determining whether the length of delay is reasonable, the analysis:

> "is not meant to be a *Barker* analysis within a *Barker* analysis," but should include the seriousness of the offense, the complexity of the case, the availability of proof, and "additional circumstances includ[ing] whether Appellant was informed of the accusations against him, whether the [g]overnment complied with procedures relating to pretrial confinement, and whether the [g]overnment was responsive to requests for reconsideration of pretrial confinement."

Cooley, 75 M.J. at 260 (quoting *Schuber*, 70 M.J. at 188) (citing *Barker,* 407 U.S. at 530-31, 531 n.31).

---

[10] *See* AE LIV.

In conducting our *Barker* analysis, "we remain mindful that we are looking at the proceeding as a whole and not mere speed: 'The essential ingredient is orderly expedition and not mere speed.'" *Mizgala,* 61 M.J. at 129 (quoting *United States v. Mason,* 45 C.M.R. 163, 167 (C.M.A. 1972). "[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance." *Schuber,* 70 M.J. at 188.

Here, we conclude 249 days between the initiation of the appellant's confinement and his arraignment is beyond what we would normally expect for a general court-martial and is sufficient to trigger analysis of the remaining *Barker* factors. However, under the circumstances of the appellant's case, we find that this period of delay was not unreasonable.

The appellant's case involved extremely serious crimes, with very sensitive and complex evidentiary concerns. The appellant was charged with two specifications of espionage—one of the most serious crimes under the UCMJ as made evident by its maximum punishment of death. Further, when the appellant was placed into pretrial confinement, he was informed of the accusations against him, and the government complied with all pretrial confinement procedures. Additionally, although the appellant waived his right to be present at his pretrial confinement hearing, when the appellant requested reconsideration of his pretrial confinement status, the government was responsive to his request.

b. Reasons for the delay

Under the second factor in the *Barker* analysis, "different weights should be assigned to different reasons" articulated for the delay. *Cooley,* 75 M.J. at 260 (citing *Barker,* 407 U.S. at 531). Deliberate attempts by the government to delay the proceedings in order to hamper the defense weigh heavily against the government. *Id.* In analyzing the reasons for delay, we also acknowledge that the government "has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial." *Cossio*, 64 M.J. at 258 (citations omitted). In contrast, delay caused by the defense weighs against the appellant. *Cooley*, 75 M.J. at 260 (citing *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)). In appellant's case, the reasons for delay are consistent with the timeline adopted by the military judge and not objected to by the parties at trial.[11]

[11] *See* AE LIV at 7-9.

The investigation of the appellant's case did not end when he was placed into pretrial confinement. In this case, due to the circumstances and timing of the appellant's apprehension, the government had large amounts of information to gather and process in order to determine what charges the evidence supported. Gathering the evidence, in turn, involved multiple foreign contacts. It required the translation and transcription of several conversations conducted in Mandarin Chinese. It involved coordination with and between multiple federal law enforcement and intelligence agencies. And it was necessary to consult with numerous federal authorities to precisely determine what information disclosed by the appellant was classified, at what level it was classified, and whether any privilege would be exercised over the information. The interviews with the appellant on 11 and 12 September 2015 generated 13 hours of potentially classified content. The potentially classified content was sent to 12 separate Original Classification Authorities (OCAs) for review to determine whether the information was actually classified; if classified, its classification level; and, to provide the information's stakeholders an opportunity to exercise any privilege over the classified information. Coordinating with these 12 OCAs continued from October 2015 until 6 January 2016.

During this same timeframe, law enforcement was translating and identifying potential classified information contained within the 10 hours of recorded conversations between the appellant and the undercover agent—the most recent of which had occurred just days prior to the appellant's arrest. Potentially classified portions of the conversations were then sent to two OCAs for a classification review and an opportunity to exert a claim of privilege over any information determined to be classified. The prosecutors for the appellant's case did not receive the transcripts of the conversations or the results of the OCAs' classification reviews and privilege decisions until 5 November 2015. Charges were preferred one week later—12 November 2015.[12]

Meanwhile, on 3 November 2015 the appellant hired his first civilian defense counsel (CDC). The following day, the government provided the appel-

---

[12] The CA approved as R.C.M. 707 excludable delay the period of 12 September 2015 through 4 November 2015 in order to "identify the appropriate agencies for classification reviews, to determine the security classification of evidence, and to allow stakeholders time to assert any privilege after completion of the classification reviews." AE LIV at 4. The military judge found that the CA did not abuse his discretion in approving the 12 September 2015 through 4 November 2015 R.C.M. 707 excludable delay. *Id.* at 15.

lant's CDC with the information necessary for her to request the interim security clearances required before she could review the classified evidence in the case. However, the CDC did not submit the documentation required to process her security clearance request until 24 November. On 1 December 2015, the government notified the defense of its intent to conduct an Article 32, UCMJ, preliminary hearing within the next few weeks. The following day, the appellant's CDC notified the government that the appellant would not waive her presence at the Article 32, UCMJ, proceeding and informed the government that the appellant was asserting his rights to a speedy trial under R.C.M. 707. One week later, the CDC's requested security clearance was denied.

The appellant then hired his second CDC on 11 December 2015. The government again promptly provided the second CDC the information necessary to apply for an interim clearance, which was granted on 5 January 2016.[13] In the meantime, the appellant and his detailed defense counsel were granted access to review, subject to a protective order, the classified evidence against him on 15 December 2015. The second CDC received his final clearances and was authorized access to the classified evidence on 2 March 2016.

On 7 March 2016, the appellant requested that the Article 32, UCMJ, proceedings which had been ordered by the CA to take place not later than 23 March 2016 be delayed until at least 30 March 2016. At the further request of the defense, the proceedings were ultimately delayed until 8 April 2016.[14] The Article 32, UCMJ, preliminary hearing officer issued his report on 26 April 2016 and the appellant's charges were referred to general court-martial on 10 May 2016. The appellant then requested and the military judge approved a delay of his arraignment from 13 May until 17 May 2016. The appellant was arraigned on 17 May 2016.

Upon consideration of the reasons for delay, we find no evidence in the record that the government acted in bad faith or with malice in the processing of the appellant's case. We find the reasons for the delay here are rea-

---

[13] The CA approved as second period of R.C.M. 707 from 5 November 2015 through 5 January 2015 in order to allow the processing of and action on the CDC's request for interim security clearances. AE LIV at 6. At trial the appellant acknowledged and did not challenge that this period of delay was appropriately excluded under R.C.M. 707. *Id.* at 6-7.

[14] In conjunction with approving the request to delay the Article 32, UCMJ, proceedings until 8 April 2016, the CA also granted R.C.M. 707 excludable delay from 23 March 2016 through 8 April 2016. *Id.* at 9.

sonable, especially considering that the vast majority of the pre-arraignment delay in the appellant's case was either at his request, or to obtain the security clearances and authorization necessary to allow his CDC access to the classified evidence in order to defend him. This factor weighs against the appellant.

c. Appellant's assertion of speedy trial right

Under the third *Barker* factor, "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is deprived of the right." *United States v. Wilson*, 72 M.J. 347, 353 (C.A.A.F. 2013) (quoting *United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984)).

The appellant made a single speedy trial request. This request was made by his first CDC on 9 November 2015. Despite the request being couched in the terms of R.C.M. 707, we, like the military judge below, have considered this request to operate not only as an assertion of the appellant's right to a speedy trial under R.C.M. 707, but also Article 10, UCMJ.[15]

The weight of the appellant's speedy trial request, however, is undercut by his subsequent requests for delay. For example, following his CDC's authorization to review the classified evidence, the appellant requested a 30-day delay of the Article 32, UCMJ, proceeding, and a delay of the arraignment. Nevertheless, because the appellant did make a request for speedy trial, this factor weighs in favor of the appellant—albeit ever so slightly when considered in light of the appellant's own repeated requests for delay.[16]

---

[15] *See* AE LIV at 17-18.

[16] Even though we have determined that the appellant waived any post-arraignment claim of an Article 10, UCMJ, violation, looking beyond the arraignment, the record establishes that the appellant was not actively seeking a speedy trial. In August 2016, the defense requested a continuance to pursue letters rogatory to the Republic of Taiwan. After conducting an inquiry with the appellant to ensure that he understood the implications of and agreed with the requested delay—at the time estimated to be at least four and a half months—the military judge granted the requested continuance. He did so despite the government's assertion that it was ready to go to trial. Some six months later in February 2017, the appellant requested another two-month continuance of trial. Despite the government again asserting that it was ready to go to trial, after conducting an inquiry with the appellant to ensure that he understood the implications of and agreed with the requested delay, the military judge granted the continuance.

d. Prejudice

The final *Barker* factor is prejudice to the appellant due to the delay. Pretrial confinement by itself does not constitute *per se* prejudice. *Cooley*, 75 M.J. at 262 (internal citations omitted). Instead, prejudice is assessed in light of the interests of the appellant which the speedy trial right was designed to protect. *Barker,* 407 U.S. at 532. Jurisprudence has recognized three such interests relevant to prejudice analysis: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused awaiting trial; and (3) limitation of the possibility that the defense will be impaired. *Mizgala* 61 M.J. at 129 (citing *Barker*, 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

The appellant argues that he was prejudiced by being subjected to oppressive pretrial incarceration, not being able to fully or as actively participate in his defense, and by losing the ability to secure the testimony of several foreign national witnesses who could have exonerated him or provided mitigating evidence during his sentencing proceeding. We conclude otherwise.

On the whole of the record, we find for the following reasons that the appellant was not materially prejudiced by the delay.

First, even though we acknowledge that the military judge awarded an additional 16 days of confinement credit for Article 13, UCMJ, violations,[17] when considering the totality of the conditions of the appellant's pretrial confinement we find them to be neither harsh nor oppressive.

Second, we are unconvinced that the delay impacted the appellant's ability to secure the testimony of the foreign national witnesses. The appellant voluntarily pleaded guilty to the offenses of which he was convicted. Prior to conducting the guilty plea inquiry, the military judge explained to the appellant that by pleading guilty he was giving up his right to a trial of the facts by court-martial—that is, his right to have the court-martial decide whether or not he was guilty of the offenses based upon the evidence presented by the government and, if he chose to do so, any evidence he may present. The appellant agreed to give up this right. During the sentencing proceeding, the appellant affirmed to the military judge that his ability to provide the court with any information that he desired to present on the issue of determining an appropriate sentence in his case had not been limited. Additionally, the

[17] *See* AE CXXXIII.

record establishes the delay associated with securing the testimony of the foreign national witnesses occurred after the appellant was arraigned and that the delay was incurred at the appellant's request. Our review of the record provides no indication that the appellant's preparation for trial, defense evidence, sentencing strategy, or ability to present sentencing witnesses were compromised by the delay.

Finally, as the vast majority of the pre-arraignment delay was attributable to providing his counsel of choice access to the classified evidence against him, and providing his counsel with the time they desired to adequately review the evidence and prepare his defense, the delay tended to benefit—rather than prejudice—the appellant. Balancing the factors identified in assessing prejudice, we find that if there was any prejudice to the appellant as a result of the pre-arraignment delay, it was minimal. This factor also weighs against the appellant.

Accordingly, we conclude that the appellant was not denied his right to a speedy trial. The government was reasonably diligent in bringing the appellant to trial in accordance with the requirements of Article 10, UCMJ.

B. Admission of Evidence in Aggravation was Proper

During the pre-sentencing proceeding, the government called witnesses who testified about the harm to national defense posed by the appellant's unauthorized disclosures of classified information.[18] At trial, the appellant objected to the testimony as improper evidence in aggravation, arguing the evidence was speculative. Finding that the testimony was proper evidence in aggravation, the military judge admitted the testimony. The appellant avers that the military judge abused his discretion by admitting this testimony as aggravation of his crimes. We disagree.

We review a military judge's decision to admit sentencing evidence under the abuse of discretion standard. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). At sentencing, "trial counsel may present evidence as to any aggravating circumstances directly relating to *or* resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4) (emphasis added). R.C.M. 1001(b)(4), however, poses a higher burden than mere relevance. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

[18] Due to the classified nature of the testimony, the specific facts testified to by the witnesses will not be discussed.

Even if the evidence is directly related to or resulting from the offenses of which the appellant is convicted, the evidence will only be admitted if it also meets the requirements of MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.). *United States v. Manns,* 54 M.J. 164, 166 (C.A.A.F. 2000). "A military judge enjoys 'wide discretion' in applying MIL. R. EVID. 403." *Id.* (citing *United States v. Rust,* 41 M.J. 472, 478 (C.A.A.F. 1995)). If the military judge conducts a proper MIL. R. EVID. 403 balancing test, the "ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Id.* (citing *United States v. Ruppel,* 49 M.J. 247, 250 (C.A.A.F. 1998)). When a military judge places his or her analysis on the record, we accord them the largest measure of deference. We afford judges less deference if they fail to articulate their analysis, and no deference if they fail to conduct a balancing at all. *Id.*

Because the military judge did not conduct an MIL. R. EVID. 403 balancing, we give his decision no deference and have examined the record ourselves. The aggravating "harm to the national defense" evidence presented and objected to by the appellant was the same harm admitted to by the appellant during his providence inquiry. In short, the harm described was not just directly related to or resulting from an offense for which the appellant was convicted; rather the evidence of the harm posed by the disclosures is what made the appellant's disclosures of the information criminally punishable. The objected-to evidence directly supported an element of the appellant's 18 U.S.C. § 793(d) offenses—that the appellant had reason to believe that the information could be used to the injury of the United States or the advantage of a foreign nation.[19] Further, the evidence showed why the appellant had reason to believe that the information he admitted to disclosing could be used to injure the United States.[20] Having reviewed the objected-to testimony, we find that the military judge appropriately determined that the testimony was proper evidence in aggravation in that it was directly related to his 18 U.S.C. § 793(d) convictions and provided the military judge with an informed explanation of how the disclosures injured the national defense interests of the United States.

The probative value of the objected-to testimony described above was not substantially outweighed by any prejudicial effect. Here, the potential prejudice to the appellant was that the military judge would sentence him based

---

[19] *See* Record at 1147-47 and 1147-53.

[20] *See Id.* at 1147-44 and 1147-55 to 56.

on a harm that had not actually been proven to have occurred—that the disclosed information had actually been received by a potential adversary of the United States. We are confident that the military judge appropriately limited his consideration of this evidence. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Rodriguez,* 60 M.J. 87, 90 (C.A.A.F. 2004) (citation omitted). There is no evidence in the record to indicate that the military judge rendered a sentence that was based upon any unproven harm to the national defense interests of the United States. To the contrary, when overruling the appellant's objection to the harm evidence, the military judge repeatedly announced that, absent evidence to the contrary, although the information disclosed could be used to the injury of the United States or the advantage of a foreign nation, he would not presume that the injury or advantage had actually occurred. Accordingly, we find the military judge did not abuse his discretion in admitting the testimony.[21]

C. Sentence Appropriateness

The appellant next avers that his adjudged sentence was inappropriately severe given his strong case in extenuation and mitigation, and when compared to other cases involving the mishandling of classified information. We disagree.

We review *de novo* the appropriateness of sentences. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We will only affirm a sentence, or such part of a sentence, that we determine should be approved on the basis of the entire record. Art. 66, UCMJ. Our assessment of the appropriateness of a sentence requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982) (citation and internal quotation marks omitted). A sentence is appropriate when justice is done and "the accused gets the punishment he deserves." *United States v. Key*, 71 M.J. 566, 573 (N-M. Ct. Crim. App. 2012) (citing *United*

[21] Even if we were to assume that the military judge erred in admitting the testimony, adhering to the principles set forth by our superior court in *United States v. Sales,* 22 M.J. 305 (C.A.A.F. 1986) and *United States v. Winckelmann,* 73 M.J. 11 (C.A.A.F. 2013), we are confident that we could reassess the appellant's sentence to obviate the impact of the error. *United States v. Moffeit,* 63 M.J. 40, 41 (C.A.A.F. 2006). Based upon our review of the record, absent the witness's testimony we would reassess the appellant's sentence to be that which he received at trial—confinement for 9 years, forfeiture of all pay and allowance, and a dismissal.

States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)). Despite our significant discretion in reviewing the appropriateness and severity of an adjudged sentence, we cannot engage in acts of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

1. Case in extenuation and mitigation

The appellant argues that the evidence he presented during the presentencing proceeding was not appropriately considered by the military judge. He asserts that the evidence he presented demonstrates that he did not intend to harm the United States when he provided national defense information to those he knew or believed to be foreign agents, nor did he do it for personal enrichment. He also highlights his strong professional record consisting of competitive assignments over an 18-year career, the actions he performed in the furtherance of protecting of our national defense interests, his openness with investigators, and his ultimate decision to plead guilty.

Like the military judge below, we too have considered the appellant's extensive case in extenuation and mitigation. However, weighing against the appellant's otherwise commendable service and conduct is the seriousness of his misconduct which included providing classified information to foreign agents and those he believed to be foreign agents, falsifying his leave requests, and mishandling classified documents.

The maximum sentence the appellant faced as a result of his convictions was confinement for 36 years, forfeiture of all pay and allowance, and dismissal from the Navy. Having given individualized consideration to the appellant, the nature and seriousness of his offenses, his character, record of service, and all other matters contained in the record of trial, we find that the adjudged and approved sentence in this case of nine years' confinement is appropriate. We are convinced that justice was done and the appellant received the punishment he deserved. *Healy,* 26 M.J. at 395.

2. Closely related and disparate?

The appellant also complains that when compared to similar cases, his sentence was inappropriately severe. We disagree. Each "court-martial is free to impose any [legal] sentence it considers fair and just." *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Therefore, "[t]he military system must be prepared to accept some disparity . . . provided each military accused is sentenced as an individual." *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001) (discussing disparity in sentencing of codefendants) (citations omitted). In execution of this highly discretionary function, Article 66, UCMJ, does not require us to consider sentences in other cases, except when those cases are "closely related." *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985); *United States v. Noble,* 50 M.J. 293, 294 (C.A.A.F. 1999); *United States*

v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001). As a general rule "sentence appropriateness should be determined without reference to or comparison with the sentences received by other offenders." *Ballard*, 20 M.J. at 283 (citations omitted). Notably, one narrow exception to this general principle of non-comparison exists. We are "required . . . 'to engage in sentence comparison with *specific cases* . . . in those rare instances in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases.'" *Wacha*, 55 M.J. at 267 (citations omitted) (emphasis in original).

When requesting relief by way of this exception, an appellant's burden is twofold: the appellant must demonstrate "that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). If the appellant succeeds on both prongs, then the burden shifts to the government to "show that there is a rational basis for the disparity." *Id.*

For cases to be considered closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). This threshold requirement can be satisfied by evidence of "co[-]actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288.

In this case, the appellant's request for sentence comparison and relief is based on his assertion that his sentence violates the principle of general sentence uniformity. In support of his argument, he cites to numerous cases of servicemembers who were convicted of mishandling or disclosing classified information and received lesser sentences. Having reviewed the cases cited by the appellant, we do not find them closely related. The cases did not involve co-actors of the appellant. Nor do the cases cited involve offenses that are similar in both nature and seriousness to the appellant's or involve a common or parallel scheme.

Having failed to meet his initial burden of showing that his case is closely related to any of the cases he cites, we decline his invitation to engage in sentence comparison.

D. CMO Error

Our review of the record has revealed that the results of the appellant's proceedings are not accurately reflected in the CMO. An appellant is entitled to an official record accurately reflecting the results of his proceedings. *United States v. Crumpley,* 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1989). We test error in CMOs under a harmless-error standard. *Id.*

At a minimum, a CMO must contain the following information: (1) the type of court-martial and the convening command; (2) *a summary of all charges and specifications on which the appellant was arraigned*; (3) the *appellant's pleas*; (4) the findings or *disposition of all charges and specifications on which the appellant was arraigned*; (5) if adjudged, the sentence; and (6) a summary of the action taken by the CA in the case. R.C.M. 1114(c)(1) (emphasis added).

Although not raised by the parties, we note that the court-martial order incorrectly fails to reflect that the appellant was arraigned on Charge I, Specification 2, and Charge III, Specification 1 as listed on the charge sheet, and entered pleas of not guilty to these offenses.[22] Following his entry of pleas, Charge I, Specification 2 was later dismissed with prejudice by order of the court[23] and Charge III, Specification 1 was withdrawn and dismissed without prejudice by the convening authority.[24] The failure to reflect these offenses, the appellant's plea of not guilty to them, and their ultimate disposition in the CMO was error; however, the error was harmless as it did not materially prejudice the appellant's substantial rights. To ensure the appellant has an official record which accurately reflects his proceedings, in our decretal paragraph we will order that the supplemental CMO reflect the information omitted.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to appellant's substantial rights occurred. Art. 59 and 66, UCMJ. Accordingly, the findings and sen-

---

[22] Following the disposition of these offenses, the military judge renumbered the remaining specifications under the respective charges. Although it is not error to do so, this practice often results in erroneous CMOs. Based upon our review of cases containing CMO errors, we note that it is often the renumbering of the remaining charges and specifications which ultimately leads to offenses, pleas entered to those offense, and the disposition of those offense being erroneously omitted from the CMO. To avoid these oft repeated CMO errors, we suggest that the practice which best ensures record clarity and accuracy is to refrain from renumbering the charges or specifications following the entry of pleas.

[23] *See* Record at 367; AE LVII.

[24] *See* Record at 423.

tence as approved by the convening authority are **AFFIRMED**. The supplemental CMO shall reflect all charges and specifications to which the appellant entered pleas and the final disposition of those offenses.

Senior Judge HUTCHISON and Judge CRISFIELD concur.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court