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

Before
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NATHAN A. SMITH
YEOMAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200600156
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 August 2004.
Military Judge: CAPT G.M. Felder, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CAPT D.L. Bailey, JAGC, USN.
For Appellant: LT Kathleen Kadlec, JAGC, USN.
For Appellee: LT Justin Dunlap, JAGC, USN.

16 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Judge:

Officer and enlisted members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of conspiracy to commit larceny, one specification of making a false official statement, seven specifications of larceny, and eight specifications of making a false claim against the United States, in violation of Articles 81, 107, 121, and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 921, and 932. The appellant was sentenced to confinement for one year, forfeiture of all pay and

allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant assigns six errors.[1] After carefully considering those assigned errors, the record of trial, the Government's response and the appellant's reply, we conclude that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was assigned as a yeoman on board USS CARNEY (DDG 64) when he conspired with Disbursing Clerk First Class (DK1) Lynch to defraud the United States. DK1 Lynch, who pled guilty at a general court-martial for his role in the conspiracy, created false financial entitlements, then processed them and electronically deposited the ill-gotten funds into co-conspirators' bank accounts, including the appellant's. The appellant then kicked back half of the money to DK1 Lynch.

Restriction of *Voir Dire*

In his first assignment of error, the appellant asserts that the military judge unreasonably and arbitrarily limited defense counsel's ability to make reasoned and informed decisions about challenges by denying the defense request to ask certain general *voir dire* questions.

The purpose of *voir dire* is to have an "intelligent exercise of challenges" and "counsel should not purposely use *voir dire* to present factual matter which would not be admissible or to argue the case" to the members. RULE FOR COURTS-MARTIAL 912(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.),

[1] The assigned errors are:

I. THE MILITARY JUDGE ABUSED HIS DISCRETION BY IMPROPERLY LIMITING TRIAL DEFENSE COUNSEL'S VOIR DIRE OF THE VENIREMEN.

II. THE MILITARY JUDGE ABUSED HIS DISCRETION IN FINDING THAT THERE WAS NO UNREASONABLE MULITIPLICATION OF CHARGES AT APPELLANT'S TRIAL.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING THE GOVERNMENT TO INTRODUCE PROSECUTION EXHIBIT EIGHT.

IV. THE MILITARY JUDGE FAILED TO FULLY INSTRUCT THE MEMBERS REGARDING THE ELEMENTS OF ARTICLE 132 OF THE UNIFORM CODE OF MILITARY JUSTICE.

V. APPELLANT'S DISHONORABLE DISCHARGE IS UNJUSTLY SEVERE IN LIGHT OF HIS INDIVIDUAL CIRCUMSTANCES AND THE SENTENCES IN RELATED CASES.

VI. THE UNREASONABLE POST-TRIAL DELAY IN THE POST-TRIAL PROCESSING OF THIS CASE MATERIALLY PREJUDICED THE APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW.

Discussion. The relevant rule provides in part: "The military judge may permit the parties to conduct the examination of members or may personally conduct the examination." R.C.M. 912 (d). "The nature and scope of the examination of members is within the discretion of the military judge." *Id*., Discussion.

In determining the scope of *voir dire,* the military judge is given wide discretion. *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). The military practice parallels practice in federal district courts under FED.R.CRIM.P. 24(a), where the trial judge also has broad discretion to decide what questions may be asked of jurors to determine their fitness to serve. *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996)(citing *Hebron v. Brown*, 248 F.2d 798-99 (4th Cir. 1957)). When the court reviews issues involving a military judge's limitation of *voir dire*, we "should reverse only when a clear abuse of discretion, prejudicial to a defendant, is shown." *Id*. (quoting *United States v. Loving*, 41 MJ 213, 257 (1994), *aff'd*, 57 U.S. 748 (1996)(internal quotation marks omitted)).

Before addressing the assigned issue, the court notes that, after litigating the propriety of their respective general *voir dire* questions, both the Government and the trial defense counsel declined to conduct any general *voir dire*. Record at 149. Furthermore, during the individual *voir dire* which was conducted, the military judge permitted the trial defense counsel to ask questions without limitation. Considering both of these facts, the record is strongly indicative of waiver on the issue of the military judge's initially sustaining Government objections to general *voir dire* questions tendered by the defense. However, waiver has not been raised or briefed. In the interests of judicial economy and to avoid additional delay in these already lengthy proceedings, this court will not return the case for additional briefing on waiver, but will rely instead upon the substantive determination of the issue presented.

Applying the above principles, we hold that the military judge did not abuse his discretion. Of the more than three dozen questions originally tendered by the defense for general *voir dire*, the Government objected to 13. The military judge sustained five of those objections.[2] Having reviewed the objectionable questions and the context in which they were propounded, we hold that the military judge was correct: the excluded questions misstated the law, were confusing, cumulative, or appeared principally crafted to convey factual material to the members rather than to elicit information upon which to base challenges.[3]

[2] The appellant's submission to this court states that the military judge sustained three of the Government's objections. Appellant's Brief of 31 Oct 2006 at 2. The record indicates that five of the defense proposed *voir dire* questions (Appellate Exhibit XXI) were disallowed by the military judge. Record at 106-11.

The record shows that the defense had a full and meaningful opportunity to question the members during *voir dire* and to make informed decisions regarding the exercise of defense challenges. The military judge's ruling disallowing the five tendered defense questions was not an abuse of discretion.

Unreasonable Multiplication of Charges

In his second assignment of error, the appellant asserts, as he did at trial, that his false claim and larceny charges represent an unreasonable multiplication of charges because the false claims were merely the mechanism by which the larcenies were accomplished. As such, the appellant maintains that the false claim convictions may not survive in the face of the larceny convictions of which they are a part. We disagree.

In determining whether or not the charges represent an unreasonable multiplication of charges, we apply the analysis set forth in *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001), *modified on remand,* 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In the case *sub judice*, the specifications of the larceny and false claim charges are aimed at distinctly separate criminal acts: the fraudulent establishment of entitlements for which the named personnel were not eligible, and the separate act of stealing the Government's money by liquidating those entitlements through electronic transfers of Government funds to individual bank accounts. Though closely related, the two acts needed to accomplish this fraudulent scheme were separate in time and the offenses charged have different elements.[4]

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[3] Record at 106-11 and AE XXI:

1. I. Proof beyond a reasonable doubt is the highest standard in American law. Before you can take away a person's liberty, the law says a juror must go to a standard called beyond a reasonable doubt. This means that if at the end of a case, you have even a REASONABLE DOUBT AS TO ONE ELEMENT OF PROOF you are required to find YN3 Smith not guilty. (emphasis in original).
1.Q. Do you believe that the more times a person rehearses a story, the better that person can repeat the story?
1.R. Do you believe that if a person makes up a lie, then evidence of that lie will reveal itself through inconsistent details in the story?
1.S. How many members believe that the defense must be able to explain why the witness lied before you could reach a finding of not guilty?
2.B. How many of you believe that there is at least a 50% chance that YN3 Smith did something to force the Navy to take him to a court-martial?

[4] The elements of making a false claim in violation of Article 132, UCMJ, include: 1) that the accused made a certain claim against the United States; 2) that the claim was false; and 3) that the accused then knew that the claim was false. The elements of larceny in violation of Article 121 are: 1) that the accused wrongfully took certain property, from the possession of the owner 2) that the property belonged to the owner; 3) the property was of a certain value; and 4) that the taking was with the intent to permanently appropriate the property for the use of the accused or a person other than

Furthermore, the specifications of making false claims and of larceny do not misrepresent or exaggerate the appellant's criminality. This is not a case in which a simple subterfuge accomplished a larceny by trick such that separately charging the trick and the theft might be unreasonable. The appellant and his co-conspirators devised and executed a fairly complicated scheme of fraud, which – at least for a time – successfully stole Government money through a series of fraudulent claims and electronic deposits of money liquidating those claims. Charging the appellant with both the false claims and larceny accurately reflects the nature of this criminal enterprise.

Additionally, since the military judge consolidated the false claim and larceny specifications prior to sentencing and properly instructed the members, the fact that the Government separately charged these offenses did not expose the appellant to any increased punishment. Finally, the appellant's assertion of prosecutorial overreaching is not supported by the record, which shows that the Government dismissed some charges prior to trial and affirmatively moved to consolidate the false claim and larceny specifications for purposes of sentencing. Based on the record in this case, we find no unreasonable multiplication of charges.

Improper Government Rebuttal Evidence

In his next assignment of error, the appellant asserts that the military judge abused his discretion in permitting the Government to introduce some of the appellant's bank records. The records were offered as Prosecution Exhibit 8 during the Government's rebuttal case to counter the appellant's trial testimony. The appellant testified that, during the summer of 2002, he was overpaid and that he attempted to remit the overpayment by asking NFCU to transfer $1,000 to DK1 Lynch's account. He further testified that DK1 Lynch would then return the money to the Government. The bank records admitted into evidence by the Government, over defense objection, indicated no such transactions.

The appellant asserts that the bank records were improper impeachment under MILITARY RULE OF EVIDENCE 608, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), that the records were unfairly prejudicial and should have been excluded under MIL. R. EVID. 403, and that trial defense counsel was not given sufficient time to counter their effect once they were admitted.

We can quickly dispose of the appellant's first argument, because MIL. R. EVID. 608 simply does not apply to these facts. That rule governs evidence of truthful or untruthful character and specific conduct of a witness related to his character for

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the owner. *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 46b *with* ¶ 58b(1).

truthfulness. MIL. R. EVID. 608(a) and 608(b). Bank records are neither character nor opinion evidence of truthfulness; neither are they evidence of conduct by the witness related to his character for truthfulness. Rather, the use of bank records in this case is an example of impeachment by contradiction.[5] *United States v. Cobia*, 53 M.J. 305, 311-12 (C.A.A.F. 2000)(citing MCCORMICK ON EVIDENCE § 45, at 184 (5th ed. 1999)). Having identified the purpose of the evidentiary proffer, we can proceed to evaluate whether it was properly admitted during the Government's rebuttal case.

We begin by noting that "'[t]he scope of rebuttal is defined by evidence introduced by the other party'." *United States v. Matthews*, 53 M.J. 465, 469 (C.A.A.F. 2000)(quoting *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992)). Further, MIL. R. EVID. 402 permits all relevant evidence to be admitted, unless it is excluded by another rule or law. Evidence is relevant if it has "any tendency to make the existence of any fact . . . more or less probable than it would be without the evidence." MIL. R. EVID. 401. Finally, a military judge's decision to admit or to exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000)). "We will not overturn a military judge's evidentiary decision unless that decision was 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *Id.* (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

The appellant obviously concedes that evidence indicating he was overpaid and that he tried to repay the Government was relevant. He testified to these facts, himself. Indeed, along with good military character, these facts were the core of the case presented by the defense through the testimony of the appellant. Any bank record reflecting the financial transactions about which the appellant testified would also have been relevant and admissible by him under MIL. R. EVID. 401, assuming proper foundation. Such records would tend to make more probable the existence of the fact of his being overpaid and his attempt at refunding the money – key components of his defense.

It follows with equal logic that the absence of such a financial transaction in the bank record is relevant and, far from being extrinsic evidence of a collateral fact, it directly contradicts the defense theory of their case. *United States v. Lopez*, 979 F.2d 1024, 1034 (5th Cir. 1992)("Extrinsic evidence is material, not collateral, if it contradicts 'any part of the witness's account of the background and circumstances of a

[5] Trial counsel characterized his proffer of the bank records as a substantive document that would rebut the testimony of the appellant. Record at 552-53. He also said that the document was not offered as impeachment by a prior inconsistent statement. *Id.* at 557.

material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.'")(quoting *United States v. Carter*, 953 F.2d 1449, 1458 n.3 (5th Cir. 1992). *See also* MIL. R. EVID. 608(c), Analysis (impeachment by contradiction permissible).

Stated differently, appellant's testimony that he was overpaid during the summer of 2002, and that he attempted to repay the money through a bank transfer, opened the door for the relevant contradictory evidence contained in his own bank records. Procedurally, then, the Government's tender of evidence as rebuttal was correct because it was logically relevant to disproving the preceding testimony of the appellant during his case-in-chief. *Compare* R.C.M. 913(c) *and* MIL. R. EVID. 401, 402 and 611; *see also United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992)("It is well settled that the function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party.")(citations and internal quotation marks omitted).

The appellant is correct, of course, that before admitting the contradictory rebuttal evidence over the defense objection, the military judge must exercise his discretion under MIL. R. EVID. 403. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)(all evidence subject to balancing test of MIL. R. EVID. 403). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MIL. R. EVID. 403.

In weighing the probative value of the bank record against its potential prejudicial impact, the military judge explicitly recited MIL. R. EVID. 403 in the context of Rules 401 and 402. He determined that the document was relevant, probative and not substantially outweighed by possible prejudice. In so doing, the military judge stated that the significance of the document, or lack thereof, particularly as it related to its impact on the appellant's credibility, could be adequately addressed through the argument of counsel to the members. Record at 602. We agree. There was nothing inherently inflammatory about the bank record; it simply recited a listing of financial transactions on certain dates. Its probative value as substantive evidence of the non-existence of a financial transaction is, therefore, substantial and it is not outweighed by the prejudice attending proof of that fact. The document's prejudicial impact, however, also derives from the fact that it could be viewed by the members as evidence that the appellant's testimony was not truthful. This impact, however, is secondary and is not unfair particularly since the bank record belonged to the appellant and he chose to testify seemingly at odds with it.

The court in *Cobia* noted "the purpose of a trial is truthfinding, as illusive [sic] as that might be. Thus, it is permissible to contradict the testimony of a witness with relevant facts in order to facilitate the search for truth by

the members." 53 M.J. at 310-11. That is what the Government did in this case, thus the military judge's ruling admitting the evidence was neither erroneous nor an abuse of direction. Before leaving this issue, however, we will address appellant's complaint that his trial defense counsel was not given adequate time to prepare a response to the admission of the bank record.[6]

Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just. *United States v. Allen,* 31 M.J. 572, 620 (N.M.C.M.R. 1990)(citing *United States v. Plummer,* 3 C.M.R. 107 (C.M.A. 1952)). A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made. *Id*. (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)). To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted. *Id*. However, absent a showing of an abuse of discretion, the ruling of the military judge will not be overturned. *Id*. at 620 (citing *United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982)).

In this case, when the defense objected to the admission of the bank record, and after hearing argument by counsel, the military judge allowed an overnight adjournment so that both parties could consider their respective positions. The following day, when the military judge indicated he would allow the Government to admit the bank records to rebut the appellant's trial testimony, trial defense counsel asked for a twenty-minute recess to decide what to do. The military judge granted that recess. Thereafter, the defense requested an additional one-day delay to prepare surrebuttal and otherwise determine how to respond. When the military judge asked for further clarification, trial defense counsel indicated only that she needed to consult with her client and that even a half-a-day recess would not be sufficient. Record at 584. The military judge found the requested delay to be excessive under the circumstances. He nevertheless determined that some delay was justified and granted the trial defense counsel a two-and-one-half hour recess to consult with her client.

The trial defense counsel could not have been surprised about the existence of her client's bank records, or that the appellant had made a prior statement, substantially similar to his trial testimony, which appeared to contradict the bank

[6] The appellant also asserted various other objections at trial and on appeal, including lack of Government due diligence in investigating; failure to charge an additional false official statement related to Prosecution Exhibit 8; failure to timely disclose Prosecution Exhibit 8; and failure to cross-examine the appellant about Prosecution Exhibit 8. We have considered all of the other objections, but find that none have merit.

records.[7] It appears, however, that the surprise expressed by the trial defense counsel was not as to the existence of the documents at issue, but to the fact that the Government had obtained the bank records during the course of trial and intended to use them in rebuttal.[8] Accepting at face value that the defense was surprised by this tactical development, we agree with the military judge that some delay in proceedings was in the interest of justice. We also accept, as did the military judge, the trial defense counsel's justification that she needed time to consult with her client. In the absence of an articulated further need to obtain a specific item of evidence, a key witness, or to take some other specific action in order to meet the Government's proof, the judge's grant of a third recess of two-and-one-half hours does not appear to have been an unreasonable response to the trial defense counsel's request to consult with her client, particularly when the judge had already granted an overnight adjournment and a twenty-minute recess. While appellant continues to assert the that recesses were inadequate, he has not shown what substantial right was at risk of prejudice at that time, what action needed to be taken to protect himself, or why the time granted was not adequate. As a result, we find the military judge's decision was not an abuse of his discretion.

Instructions

The military judge read instructions to the members on the elements of a violation of Article 132, "presenting" a false claim, whereas the accused was charged with "making" – not presenting – false claims. Prior to and after reading his instructions, the military judge asked the trial defense counsel whether she objected to the findings instructions. Both times, the trial defense counsel replied in the negative. Record at 604, 693. Furthermore, there was no defense request for additional instructions. The failure to object to an instruction or to request a specific instruction forfeits the issue, unless it amounts to plain error. *See United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001). Even "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999)(emphasis in original). To show plain error, an appellant must establish an error which "must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States*

[7] Obviously, the bank records were the appellant's own and he and his counsel knew of his written statement to Naval Criminal Investigative Service, as the Government disclosed it pretrial and admitted it into evidence as Prosecution Exhibit 6.

[8] Defense counsel urged that this late action indicated some lack of due diligence on the part of the Government or that the Government had not timely disclosed the document. Neither assertion has merit under the facts of this case.

v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)(quoting *United States v. Young*, 470 U.S. 1, 16 n.14 (1985)); *see also United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). Furthermore, the plain-error doctrine "'is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000)(quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

The principal distinction between the elements of "presenting" and "making" a false claim under Article 132 is the initial element of each, which respectively use the terminology "presented" and "made." The other elements are the same. The only instructional component omitted by the military judge was the definition of "making," which is "the preparation of a claim and taking some action to get it started in official channels." Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 559 (15 Sep 2002). However, while omitting to instruct on the prescribed definition of "making," the military judge did describe as an element of presenting "that the accused did so by preparing a voucher for approval" and "presented the claim." This language carried the same import as the definition of "making." The judge's error, though obvious, was insubstantial and harmless.

Perhaps more importantly, the appellant was not charged with the actual making or presenting of the claims. Rather, he was charged under a conspiracy theory, which was properly instructed upon by the military judge. Under these circumstances, there was no contest about whether the false claim was made, as compared to having been presented, by the co-conspirator. To the extent that the making of the claim was at issue, that action was included in the act of presenting it. *See United States v. Oliver*, 56 M.J. 695, 704 (N.M.Ct.Crim.App. 2001), *aff'd*, 57 M.J. 170 (C.A.A.F. 2002). As a result, the findings in this case necessarily include both that the claim was false and that it was the product of an action by a co-conspirator, who prepared and presented it – actions that fall within the definition of "making." Thus, the findings comport with a correct statement of the law and they are supported by the evidence beyond a reasonable doubt. The appellant's conviction was, therefore, not fundamentally unfair.

Finally, the military judge consolidated the false claim specifications with their companion larceny specifications prior to sentencing, ameliorating any possible prejudicial impact. Based on the foregoing, we find there has been no miscarriage of justice as a result of the military judge's erroneous instruction and we affirm.

Sentence Appropriateness

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

The appellant points to the sentences in the cases of three co-conspirators, none of which included a dishonorable discharge, and he maintains that his dishonorable discharge is, therefore, unduly severe. We disagree.

The two co-conspirators most closely in the appellant's position were also recipients of stolen money from DK1 Lynch. Unlike this appellant, however, these two co-conspirators were convicted of stealing about one-half the amount of the money taken by the appellant and neither was convicted of any other charges. Both also provided some level of cooperation, while the appellant lied to investigators. On these facts, the cases are easily distinguishable from the appellant's in terms of sentence parity.

The case against the senior disbursing clerk, though related, is also not factually similarly to this appellant's. DK1 Lynch pled guilty to conspiracy, theft of $166,836.00 and to failing to obey a general regulation. DK1 Lynch's sentence included a substantial fine in the full amount of his theft, four years confinement, and an additional four years in the event the fine was not timely paid. By comparison, the appellant was adjudged fairly limited confinement and was not required to pay any fine. The sentences of the appellant and DK1 Lynch, as well as those of his other co-conspirators, are understandably different, but appear qualitatively and quantitatively tailored to the offenses of each accused. As such, they are not so disparate as to be unfair.

Regarding sentence propriety, the record shows that the appellant was convicted of conspiracy with other Navy personnel and of multiple larcenies, totaling more than $35,000. He was also convicted of lying to investigators. The maximum sentence the appellant faced included a dishonorable discharge and 85 years of confinement. The dishonorable discharge, balanced as it was by minimal confinement, is appropriate for this offender and his offenses.

Post-Trial Delay

The appellant contends that the 579-day delay in the post-trial processing of his appeal violates his due process rights and warrants relief, though the only prejudice he recites is speculation that if this court were to order a rehearing, he might have difficulty finding witnesses. Nevertheless, assuming without deciding that the appellant was denied his due process

right to speedy post-trial review and appeal, we conclude that any error in that regard is harmless beyond a reasonable doubt.[9] *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The delay also does not affect the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

We conclude that the findings and 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.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge FELTHAM and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court

[9] We also note that the appellant, through his counsel, filed a Motion for Leave to File Motion for Expedited Review on 14 September 2007. That motion asserted no specific prejudice. In light of the court's action in this matter, the motion is deemed moot.