1002. The Supreme Court has approved this practice. *Jackson v. Taylor*, 353 U.S. 569, 574 (1957); *Carter v. McClaughry*, 183 U.S. 365, 393 (1902). A fine is authorized for these offenses. R.C.M. 1003(b)(3). We find the sentence to a fine was not illegal.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER
Chief Court Administrator

had involved myself in a federal offense many times." The investigator testified at trial that the appellant confessed that the first time they wrongfully entered the postal squadron and stole mail was the first night the base went into Force Protection Condition Delta, which he took to be 11 September 2001. There was no objection at trial. Finally, the SJAR contained the same factual assertion and the defense team did not respond when given an opportunity to do so. We find this was not "new matter." Under the circumstances, we cannot conclude it was inaccurate.

The appellant also complains that he stole the mail because he felt "overworked," but that he never said he felt "underpaid." The investigator testified at trial that the appellant said he felt "under-appreciated and that he was not justly compensated for the amount of work he puts in. He felt the Air Force owed him more." The defense did not object at trial. The SJAR described the appellant's motivation in almost identical terms, but the defense team offered no objection or reply in the clemency submission. We find this was not "new matter."

We note, finally, that this opinion is not an endorsement of the methods employed here. The SJAR is the government's opportunity to comment on the case and to provide the information necessary for the convening authority to make an informed decision. If the defense submissions require the government to discuss "new matter" to adequately respond, the addendum must be served on the defense for review and comment. If the defense submissions do not require "new matter" in the addenda, then a second lengthy discussion of the case is unnecessary. As our superior court observed, "SJAs control the process. They can avoid multiple addenda and defense responses by limiting their responses to a 'statement of agreement or disagreement with the matter raised by the accused[,]' without reciting additional facts or legal arguments." *Leal*, 44 M.J. at 237. It is often better for the addendum to contain a simple statement of agreement or disagreement. *See* R.C.M. 1105(d)(4). However, that is not strictly required. For the reasons discussed above, we find no error in this case.

Legality of the Sentence

The appellant, citing *Grostefon*, 12 M.J. at 435-36, raises an additional assignment of error. He contends that portion of his sentence including a $25,000.00 fine is illegal. Relying upon the security notice he received upon entry into the squadron (Prosecution Exhibit 47), he asserts the federal statute prohibiting mail theft, 18 U.S.C. § 1709, sets the maximum punishment at a fine of not more than $2,000.00 and imprisonment for not more than 5 years, or both.

Of course, the appellant was not charged or sentenced under 18 U.S.C. § 1709. Rather, he was charged and sentenced under the UCMJ, 10 U.S.C. § 801, et seq. The Uniform Code of Military Justice employs a unitary sentencing procedure; that is, one sentence is adjudged for all the offenses. Article 56, UCMJ, 10 U.S.C. § 856; R.C.M.

remaining letters from supervisors were included as sentencing exhibits in the original record of trial. We also note the addendum specifically listed SMSgt Ruzza's letter and advised the convening authority to read it. The letter clearly explained SMSgt Ruzza's relationship to the appellant. Under circumstances, we consider any error in summarizing the clemency matters to be trivial. *Jones*, 44 M.J. at 244.

Trial defense counsel complains that the comment in the addendum about "people who were waiting for the items they ordered" was improper, because no one testified at trial that they did not receive their mail. While that may be true, it was discussed on the record that the stolen property was addressed to others—indeed, it was an element of the offense of mail theft. Also, there was mention in the record of trial and the SJAR of the identities of specific owners of some of the property. We find this comment was not "new matter." *Id.*

Trial defense counsel also complains that "a $10,000 computer was not 'ordered'" because, "The transaction was never completed." However, the addendum actually said the appellant used "a computer he stole from the mail to *try* to order a $10,000 computer on-line" (emphasis added), so the language is not inaccurate. Moreover, it merely repeated information already contained in the SJAR. This comment was neither misleading nor "new matter."

Trial defense counsel and the appellant complain about the reference in the addendum to his "sad story to tell of an out-of-wedlock child he's seen but once and a stepfather who's ill." However, the defense does not indicate why this comment is improper. Clearly this is not "new matter"; to the contrary the appellant related this personal information in his unsworn statement admitted at trial and offered again in clemency. While phrased somewhat severely, it is simply a refutation of the defense's argument in support of clemency.

The appellant complains about the comment that his clemency submission "glosses over the facts of the case." This is not "new matter"—instead, it responds to the defense clemency submission, making the government's point that the seriousness of the offenses outweigh the mitigating factors.

The appellant also contends the addendum contained the following inaccurate comment: "When Yokota was responding to the horrific events of 11 Sept 01 by going to Force Protection Condition Delta, the accused was beginning his series of break-ins and thefts from the Aerial Mail Terminal because he felt overworked and underpaid." The appellant asserts that he never said the break-ins began on 11 September 2001, although he admitted that one of the break-ins occurred on that date. We note that the appellant's confession, admitted into evidence as Prosecution Exhibit 49, began by saying, "I believe that on the first night the base hit delta myself and airman Frederickson [sic] where [sic] within the AMT. Where [sic] we supposed to be there no. It was after duty hours and I

R.C.M. 1106(f)(7), Discussion. Case law provides further examples of what constitutes "new matter." A reference to the results of an extra-record inquiry is "new matter." *United States v. Norment*, 34 M.J. 224, 226-27 (C.M.A. 1992). A comment upon a second positive urinalysis not admitted into evidence at trial is "new matter." *United States v Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). *See United States v. Leal*, 44 M.J. 235, 236 (C.A.A.F. 1996) (letters of reprimand offered but not admitted into evidence are not part of the record of trial for post-trial processing purposes); *United States v. Anderson*, 53 M.J. 374, 377 (C.A.A.F. 2000) (note from chief of staff appended to the SJAR was "new matter."). On the other hand, the staff judge advocate's discussion of the correctness of the defense comments on the SJAR does not constitute "new matter." *United States v. Gilbreath*, 57 M.J. 57, 60 (C.A.A.F. 2002); *United States v. Jones*, 44 M.J. 242, 243 (C.A.A.F. 1996); *Leal*, 44 M.J. at 238. *See United States v. Clark*, 22 M.J. 708 (A.C.M.R. 1986) (not "new matter" when it has its genesis in submissions by the accused or defense counsel).

This Court has observed that the dividing line between what is and what is not new matter can be wafer thin. *United States v. Haynes*, 28 M.J. 881, 882 (A.F.C.M.R. 1989). As our superior court noted, "Unnecessary appellate litigation can be avoided if SJAs liberally construe the term 'new matter.'" *Leal*, 44 M.J. at 237. If there is any doubt, the staff judge advocate is wiser to err on the side of caution.

Where "new matter" improperly comes before the convening authority, the appellant must demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the challenged material. *Chatman*, 46 M.J. at 323. If the "new matter" is neutral or trivial, the error may not result in prejudice. Article 59(a), UCMJ; *United States v. Buller*, 46 M.J. 467, 468-69 (C.A.A.F. 1997). The threshold for this showing is low—the appellant need only make "some colorable showing of possible prejudice." *Chatman*, 46 M.J. at 323-24. A new action is not required where the appellant does not provide a possible response that "could have produced a different result." *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000). Whether an assertion in an addendum to an SJAR is "new matter" is a question of law this Court reviews de novo. *Chatman*, 46 M.J. at 323.

We turn to the comments in the addendum challenged by trial defense counsel and the appellant. The addendum's summary of the defense clemency submission characterized the defense submissions as "a number of statements from friends and relatives of the accused along with the defense sentencing exhibits presented at trial." Trial defense counsel argues the summary is misleading, because the statements were not just from "friends and relatives" but also "the support of supervisors who detailed the amount of work" performed by the appellant. She is correct, in part. The clemency matters did include one new letter from Senior Master Sergeant (SMSgt) Ruzza, the detachment superintendent, dated the same day as the clemency submission. The

> parcels and property struck his fancy without any care or concern for the people who were waiting for the items they had ordered. The accused also had the temerity to use a computer he stole from the mail to try to order a $10,000 computer on-line and charge it to a credit card he stole from mail enroute to an employee of the US Embassy in Thailand. After the break-ins and thefts were discovered, the accused did confess and cooperate as his counsel argues, but only after he took efforts to obstruct OSI's investigation by destroying evidence. While it's unfortunate the accused has a sad story to tell of an out-of-wedlock child he's seen but once and a stepfather who's ill, that doesn't in any way lessen the telling details of his criminal conduct or warrant reducing an otherwise fitting punishment.

The appellant argues, in general terms, that the addendum contains "new matter" improperly provided to the convening authority without giving the defense an opportunity to examine the material or to submit a response. Appellate defense counsel does not identify any specific language deemed to be inappropriate. However, trial defense counsel and the appellant provide affidavits indicating what responses they would have made to select phrases in the addendum if given the opportunity. The government maintains the contested comments in the addendum are not "new matter" because they were already included in the record of trial and the SJAR.

Before taking action in a general court-martial, the convening authority must review the written recommendation of the staff judge advocate. Article 60(d), UCMJ, 10 U.S.C. § 860(d). The accused and the defense counsel have the right to review the recommendation along with the record of trial, and may submit matters in response. Article 60 (d), UCMJ.

When an accused submits matters for consideration, the staff judge advocate must advise the convening authority of his obligation to consider these matters. *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). Typically this is accomplished by preparing an addendum to the SJAR. If the addendum does not contain new matter, it need not be served upon the defense. "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments." R.C.M. 1106(f)(7).

The Discussion following R.C.M. 1106(f)(7) defines the phrase, "new matter."

> "New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

The defense submitted character statements and documents reflecting the appellant's prior good service. The appellant made an unsworn statement orally, noting his contributions to the unit and the military community. He indicated he committed the offenses because he felt he "was being overworked." The appellant submitted a written unsworn statement, relating his upbringing and his personal circumstances. He said he had a child out of wedlock at age 18, that he was forbidden to see his child, and that he has only held her once. He indicated his desire to support his family and to marry his fiancé.

After trial, the staff judge advocate prepared a formal recommendation for the convening authority. The document included a lengthy discussion of the facts, including that the first break-in occurred the night the base went into Force Protection Condition Delta following the 11 September 2001 terrorist attacks. The SJAR also noted the appellant used a credit card and a computer he stole from the mail to order a $10,000 computer on-line, but the property was never shipped.

The government served the SJAR upon the appellant and his counsel. The defense submitted a lengthy package of materials in support of their request for clemency, including letters from the appellant and his defense counsel, character references, certificates, exhibits, and excerpts from the record of trial. The defense asked the convening authority to set aside the dishonorable discharge and the fine, and to refer the appellant to the Return to Duty Program.

After receiving the defense submissions, the deputy staff judge advocate prepared an addendum to the original recommendation. He listed the defense submissions, and properly advised the convening authority of his obligation to consider them. He noted the defense's reference to the appellant's cooperation with investigators, and added that it only occurred after the accused disposed of incriminating evidence. He also summarized the defense clemency submission, and provided the following response:

> The adjudged sentence is entirely appropriate for the crimes the accused committed. While the accused is quick to highlight his good duty performance prior to the offenses he committed and his cooperation and efforts to mitigate the consequence of his crimes after he was caught, he glosses over the facts of the case. Although it's his right to do so, the specifics of what he did are an essential part of your determination of whether clemency is warranted in this case. When Yokota AB was responding to the horrific events of 11 Sep 01 by going to Force Protection Condition Delta, the accused was beginning his series of break-ins and thefts from the Aerial Mail Terminal because he felt overworked and underpaid and that the same service he now asks you to allow him to remain in owed him more. Then for the next three months, he broke into the same terminal that he worked in during the day and stole whatever mail

"relative uniformity," nor did it "rise to the level of an obvious miscarriage of justice or an abuse of discretion." *Olinger*, 12 M.J. at 461.

Even if the sentences were considered to be highly disparate, we find a rational basis for the difference. Most significantly, the appellant's conduct in obstructing justice and destroying evidence, which happened to be the personal property of the victims of his thefts, made his offenses more aggravated.

Finally, the appellant argues that his sentence is excessive under all the facts and circumstances of the case. He cites his outstanding prior record of 22 months' service in the Air Force, and his awards and certificates. He also asserts that he was "not unjustly enriched in any way," because much of the property was eventually recovered. This argument is unpersuasive. Where crimes are committed for financial gain, financial punishments may be appropriate. Clearly the appellant enjoyed the benefit of the stolen property for a time before his misconduct was discovered. More significantly, the appellant's deliberate, repeated crimes involved an egregious breach of trust with his squadron, his fellow service members stationed overseas, and the United States Air Force. The sentence is appropriate for this offender and these offenses.

Post-trial Processing

The appellant contends that he was denied his right to proper post-trial review. Specifically, he asserts the addendum to the SJAR contained new matter, but the defense was not given an opportunity for review and comment before it was provided to the convening authority. We find no error.

During the sentencing proceedings, the prosecution introduced the appellant's written confession (Prosecution Exhibit 49), and numerous photographs of the property stolen from the postal squadron facility. The detachment chief for the postal squadron testified about the adverse impact the offenses had on the unit and the military community. The investigator testified about the appellant's confession, saying the appellant admitted beginning the series of thefts the first night the base went into Force Protection Condition Delta, which the agent understood to be 11 September 2001, following the terrorist attacks upon the World Trade Center and the Pentagon. The investigator also identified several of the stolen items recovered in the investigation, and related the appellant's comments about stealing them from the mail. The investigator testified the appellant said he did it because "he felt under-appreciated and that he was not justly compensated for the amount of work that he puts in. He felt that the Air Force owed him more."

sentences in closely related cases." *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). This Court held that we will examine other sentences as part of the review of sentence appropriateness when there exists: (1) a direct correlation between each of the accused and their respective offenses; (2) highly disparate sentences; and (3) no "good and cogent reasons for the difference in punishment." *United States v. Thorn*, 36 M.J. 955, 959 (A.F. Ct. Crim. App. 1993); *United States v. Kent*, 9 M.J. 836, 838-39 (A.F.C.M.R. 1980).

As originally conceived, this three-part test was designed to address the threshold question of whether this Court would even consider other sentences. However, our higher Court has changed that test for the courts of criminal appeals.

> At a Court of Criminal Appeals, an appellant bears the burden of demonstrating that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity.

Lacy, 50 M.J. at 288. The language of *Lacy* seems to create a new burden on the government to justify disparate sentences before the courts of criminal appeals. But, it falls short of creating a presumption that, where there are disparate sentences in closely related cases, the higher sentence is unreasonably severe. Rather, the responsibility of determining sentence appropriateness remains within the sound discretion of the courts of criminal appeals, subject to the review of our superior court on the "narrow question of whether there has been an 'obvious miscarriage [ ] of justice or abuse [ ] of discretion.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *Lacy*, 50 M.J. at 288 and *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978)).

Applying these principles to the appellant's case, we find that his case is not closely related to AB Fredrickson's case. While many of the charges were the same in both cases, the appellant was charged, convicted, and sentenced for two offenses that were not before the sentencing authority in AB Fredrickson's case, namely, obstruction of justice and attempted larceny of a computer. Because of the difference in the charges, the maximum possible punishments were not the same.

Nor are we convinced that the sentences are "highly disparate." The appellant's sentence was a dishonorable discharge, confinement for 2 years, total forfeitures, reduction to E-1, a fine in the amount of $25,000.00, and to be further confined for 6 months if the fine is not paid. AB Fredrickson's sentence was a dishonorable discharge, confinement for 22 months, total forfeitures, and a fine for $15,000.00, and to be confined for an additional 8 months if the fine is not paid. Simply put, the sentences are not that different. As government counsel points out, if the fines were not paid, the sentences served would almost be identical. The appellant's sentence did not exceed

By comparison, it is commonly understood that larceny is a serious crime, and that stealing from the mail is especially egregious. The record shows that this occurred at a military installation overseas, where service members are uniquely dependent upon the postal system. The appellant was assigned to the postal squadron—not only did he know the property was required to be protected, but he used his inside information to commit the crimes. The factual inquiry also reveals that he conspired with AB Fredrickson to steal the property, and broke into the facility on several occasions to accomplish that end. When queried by the military judge, the appellant acknowledged the impact of a theft upon morale, the harmful effect of a theft upon a victim, the prejudicial impact of impeding an investigation, and the potential for discredit to the service from dumping materials stolen from the mail. Finally, we find nothing inconsistent with the guilty plea in the sentencing proceedings. In his unsworn statement the appellant volunteered that, "Taking items from your squadron to discredit the Air Force was not—is not the answer . . . to my problems." For these reasons, we conclude the factual circumstances as revealed by the appellant objectively support the plea.

We also note that Article 59(b), UCMJ, 10 U.S.C. § 859(b), provides that we "may approve or affirm . . . so much of the finding as includes a lesser included offense." A lesser included offense of stealing mail matter is larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 93d (2002 ed.). The offense of larceny does not require as an element of the offense that the conduct be prejudicial to good order and discipline, or service discrediting. *MCM*, Part IV, ¶ 46b. However, considering our disposition above, it is not necessary to determine whether we may approve a lesser included offense for the specifications alleging larceny of mail matter.

Sentence Appropriateness

The appellant asserts that his sentence is inappropriately severe. Specifically, he argues that the punishment is excessive in comparison to the sentence received by AB Fredrickson. We do not agree.

This Court is given the power and responsibility of determining whether a sentence is correct in law and fact. Article 66(c), UCMJ. It is also given the "highly discretionary power to determine whether the sentence 'should be approved.'" *United States v.* Lacy, 50 M.J. 286, 287 (C.A.A.F. 1999) (quoting Article 66(c), UCMJ). Generally, sentence appropriateness should be judged by "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) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

As an exception to this general rule of "individualized consideration," courts of criminal appeals will consider the sentences of others "when there are highly disparate

> *States v. Outhier*, 45 MJ 326, 331 (1996). The record of trial must reflect not only that the elements of each offense charged have been explained to the accused, but also "make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 18 USCMA 535, 541, 40 CMR 247, 253 (1969).

Jordan, 57 M.J. at 238.

In determining whether a guilty plea is provident, the standard of review is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996). "We will not overturn a military judge's acceptance of a guilty plea based on a 'mere possibility' of a defense." *Faircloth*, 45 M.J. at 174. This Court will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

Our superior court discussed this issue most recently in *Jordan*, 57 M.J. at 238-39. In that case, the appellant pled guilty to unlawful entry of a boat by leaning on the railing of a sailboat without the owner's permission. The appellant merely answered "Yes, sir" to questions put to him about whether his conduct was prejudicial to good order and discipline or service discrediting. *Id.* at 239. The discussion of the facts revealed the appellant was curious about the boat and leaned on it to get a better view. The appellant said the owner asked a roving patrol to remove him from the boat, but that the owner did not seem agitated or upset. There was no stipulation of fact in *Jordan* to provide additional information about the facts and circumstances of the charged offense. Considering everything, the Court found that the "factual circumstances as revealed by appellant do not objectively support the third element of unlawful entry," that the conduct was prejudicial to good order and discipline, or service discrediting. *Id.* at 240.

This case is readily distinguished from *Jordan*. The factual basis for the plea in *Jordan* only showed that the appellant was curious about the boat and leaned on it, and that his feet came off the dock leaving him balanced on the boat railing. There remained a question whether he intended to board the vessel, and whether he (perhaps unfamiliar with nautical etiquette) knew that balancing oneself on the railing of a boat without permission constituted unlawful entry.

investigators interviewed him a second time, he confessed and cooperated with the investigation.

As noted above, the appellant pled guilty, inter alia, to one specification of wrongfully opening mail, four specifications of wrongfully opening and stealing mail, and one specification of obstructing justice by trying to impede an investigation, all in violation of Article 134, UCMJ. The charges were brought under clauses 1 and 2 of Article 134. A required element of each offense was that the conduct was prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces.

As required by Rule for Courts-Martial (R.C.M.) 910(c)(1) and (e), the military judge questioned the appellant at length about his understanding of the offenses to which he was pleading guilty, and the factual basis of his plea. The military judge informed the appellant of the elements of each of the offenses. He specifically advised the appellant that the offenses charged under Article 134, UCMJ, required that "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." The military judge also defined the terms "conduct prejudicial to good order and discipline," and "service discrediting conduct." The appellant agreed that the elements accurately described what he did. Thereafter, the military judge asked the appellant to tell him how he committed each of the offenses, and the appellant described his conduct relating to each crime.

The appellant now argues his pleas were improvident to the specifications under Charge III alleging violations of Article 134, UCMJ. Citing *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002), he asserts the military judge did not elicit a factual basis for finding that the appellant's conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.

Article 45, UCMJ, 10 U.S.C. § 845, requires a military judge to reject a guilty plea if an accused thereafter "sets up matter inconsistent with the plea." Our superior court ruled that, contrary to civilian practice, a military accused may only plead guilty if the plea is in accordance with the actual facts. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 2 (C.M.A. 1973); *United States v. Chancelor*, 36 C.M.R. 453, 455-56 (C.M.A. 1966). To that end, R.C.M. 910(e) provides: "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."

> In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *United Stated v. Davenport*, 9 MJ 364, 367 (CMA 1980). It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty. *United*

an investigation, all in violation of Article 134, UCMJ, 10 U.S.C. § 934; and one specification of attempted larceny of a computer, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The sentence adjudged and approved was a dishonorable discharge, confinement for 2 years, total forfeitures, reduction to E-1, a fine in the amount of $25,000.00, and additional confinement for 6 months if the fine is not paid.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant contends that his guilty pleas to the specifications alleging a violation of Article 134, UCMJ, were improvident, that the sentence is inappropriately severe, and that the staff judge advocate erred by failing to serve the defense with the addendum to the staff judge advocate's recommendation (SJAR). Additionally, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts that the $25,000.00 fine is an illegal punishment. We find no error and affirm.

Providence of the Plea—Article 134, UCMJ

The appellant was a postal clerk assigned to Detachment 2 of the Air Postal Squadron at Yokota AB. One evening in the dormitory he ran into a co-worker, Airman Basic (AB) Donovan Fredrickson, who was giving away bracelets and necklaces. The appellant inquired where he got them, and AB Fredrickson said he got them from the postal squadron. Later, the appellant spoke to AB Fredrickson again and they discussed breaking into the postal squadron at night to steal property from the mail. They knew how to get into the building after hours from working in the squadron. A few nights later they unlawfully broke into the postal squadron facility (formerly an aircraft hangar) and entered the secured area used to store mail. They read the customs declarations on parcels, opened several packages, and stole their contents. They returned on several occasions, stealing numerous items from the mail, including jewelry, cameras, a home theater system, credit cards, and other valuable items.

In November 2001, the appellant and AB Fredrickson went onto the Internet and tried to buy a computer worth more than $500, using one of the credit cards they had stolen from the mail. They did everything necessary to complete the purchase, but did not actually receive the computer.

On 4 December 2001, while unlawfully in the mail storage area, the appellant wrongfully opened a package addressed to the Army and Air Force Exchange Service containing Cross pens, but did not steal them. The discovery of the opened package prompted an investigation. On 5 December 2001, investigators interviewed the appellant about pilferage from the mail storage area. Afterward, the appellant went back to his dormitory room, retrieved a bag containing credit cards, social security cards, and bank cards that he had stolen from the mail, took them off base, and threw them into a trash can. He also pawned some expensive items previously stolen from the mail. When

CORRECTED COPY

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID W. MCNEELY
United States Air Force

ACM 35378

7 June 2004

Sentence adjudged 22 August 2002 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, reduction to E-1, a fine in the amount of $25,000.00, and additional confinement for 6 months if the fine is not paid.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of several offenses related to the theft of valuable items from the mail at Yokota Air Base (AB), Japan. The court-martial found the appellant guilty of one specification of conspiring to open and steal mail matter, in violation of Article 81, UCMJ, 10 U.S.C. § 881; one specification of unlawful entry with intent to open and steal mail matter, in violation of Article 130, UCMJ, 10 U.S.C. § 930; one specification of wrongfully opening the mail, four specifications of wrongfully opening and stealing mail matter, and one specification of obstructing justice by trying to impede