UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant KENDALL NORMAN II
United States Air Force

ACM 37945

07 May 2013

Sentence adjudged 11 March 2011 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Donald R. Eller, Jr.

Approved sentence: Bad-conduct discharge, confinement for 6 months, a fine of $10,000.00 with 4 months of contingent confinement, and reduction to E-1.

Appellate Counsel for the appellant: Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his pleas, by a general court-martial comprised of officer members of one specification of conspiracy to commit larceny of United States property, one specification of larceny, and one specification of making a false and fraudulent claim against the United States, in violation of Articles 81, 121, and 132, UCMJ, 10 U.S.C. §§881, 921, 932. The adjudged and approved sentence consisted of a bad-conduct discharge; confinement for six months; a fine of $10,000, with four additional months of contingent confinement; and reduction to the grade of E-1.

On appeal, the appellant raises five issues, asserting: (1) The military judge abandoned his impartial role by asking questions that helped the Government meet its burden of proof; (2) The military judge erred by not instructing the members on the use of uncharged misconduct; (3) The military judge erred when he told the members that the appellant must defend against the Additional Charge and would not allow the members latitude to make exceptions and substitutions with respect to the Additional Charge; (4) His rights under Article 12, UCMJ, 10 U.S.C. § 812, were violated when he was confined in immediate association with foreign nationals; and (5) He was subjected to cruel and unusual punishment when he, a city police officer when not on reserve duty, was confined in a neighboring jail.

Background

The appellant was a reservist called to active duty at Joint Base McGuire-Dix-Lakehurst, New Jersey, during the charged timeframe. He lived in or very near Philadelphia, Pennsylvania, which is deemed to be outside of commuting distance for reservists. Consequently, he was authorized to incur reimbursable lodging expenses during his active duty tour which lasted more than a year. Initially, he stayed in a base lodging facility, the All American Inn, but was eventually authorized to move to a local Candlewood Suites hotel in Mt. Laurel, New Jersey, after the base lodging became too crowded.

Airman (Amn) HA testified at the appellant's court-martial that he was also a reservist called to active duty and worked with the appellant. He testified that the appellant asked him to create a false receipt indicating the appellant had stayed at the Candlewood Suites hotel. He offered Amn HA $500. Amn HA was staying at a Candlewood Suites hotel in Bordentown, New Jersey, and used his own receipt, which displayed the Bordentown address, to create the document for the appellant. The Government also introduced evidence from the appellant's "EZ Pass" electronic toll payment account showing that he made daily trips from the base to Philadelphia. This supported the theory that he never stayed at the Mt. Laurel Candlewood Suites hotel but, rather, commuted approximately 50-60 miles every day. Thus, even though he did not stay in local authorized quarters after he was required to move out of base lodging, the appellant submitted false claims for lodging and other authorized expenses, supported by the false receipts created by Amn HA.

The appellant's scheme was uncovered after Amn HA wrote an anonymous letter to the finance office stating the appellant had stolen another Airman's receipts and submitted false claims. Amn HA was motivated to do so by the appellant's failure to pay him $400 for a second set of lodging receipts that Amn HA produced for him. Although Amn HA tried to craft the letter to steer investigators away from himself, the Air Force Office of Special Investigations was eventually able to piece the puzzle together. Both were prosecuted.

Partiality of Military Judge

Mr. MC, the former manager of the Candlewood Suites Hotel in Mt. Laurel, testified as a Government witness. He stated that, although a reservation was made for the appellant, he never showed up and it was cancelled. However on cross-examination, he indicated he may have seen the appellant at the hotel:

> Q. Mr. [MC], you also testified at an Article 32[, UCMJ, 10 U.S.C. § 832,] hearing in this case. It was a hearing prior—back in December?
>
> A. Yes.
>
> Q. And you saw [the appellant] at that time?
>
> A. Yes I did.
>
> Q. You actually recognized him?
>
> A. You guys indicated to me who he was.
>
> Q. Do you remember talking to us at your house; I think it was last week?
>
> A. Uh-huh.
>
> Q. And we discussed, and you mentioned recognizing [the appellant] from the hotel?
>
> A. I remember the conversation, yes.
>
> Q. You remember telling us that you recognized him from the hotel?
>
> A. I may have recognized him or I may have seen him.
>
> Q. May have seen him at the hotel?
>
> A. Yeah I may have seen him.

After the parties' examination of Mr. MC, the military judge asked additional questions on this topic:

> MJ: Notwithstanding what you may or may not have told counsel at some prior proceeding, take a look at [the appellant]. Sir, do you recall him being at your hotel or not?
>
> WIT: No.

MJ: But you told defense counsel previously that he looked familiar, that maybe you had seen him?

WIT: I guess anyone in uniform would look kind of familiar and that could be the statement or why I actually said that.

The prosecution also introduced a receipt from the Mt. Laurel Candlewood Suites Hotel in the appellant's name that showed a $692 charge, and then the same amount credited back, to result in no charges to the appellant. The defense's cross-examination highlighted the fact that the bill showed that there were actually six or seven days worth of charges made to the account with the appellant's name on it. However, later testimony showed the charges were reversed because the appellant never showed up for his reservation. The defense then asked Mr. MC whether changes could be made to the records. The military judge followed up with questions about whether changes could be made to a record after someone checks out. Responding to the judge's questions, Mr. MC testified that, if someone had stayed at the hotel and checked out, those records could not be deleted. Mr. MC also clarified that, once a bill was closed out, it could not be changed and that, in order to charge the appellant for staying at the hotel, a new bill would have to be created. Finally, he clarified that the bill showing the cancellation due to the appellant's no-show was the only record in the hotel's system concerning the appellant.

A judge may ask questions of any witness. Simply doing so does not indicate the judge is impartial. In fact, the judge has "wide latitude" when asking questions pursuant to the authority in Article 46, UCMJ, 10 U.S.C. § 846, and Mil. R. Evid. 614. *See United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998). "Neither Article 46[, UCMJ, 10 U.S.C. § 846,] nor Mil. R. Evid. 614 precludes a military judge from asking questions to which he may know the witness' answer; nor do they restrict him from asking questions which might adversely affect one party or another." *Id*. at 17-18.

However, when asking questions of a witness, military judges must be very careful so that it does not appear they are siding with either the prosecution or defense. It is permissible to clear up factual gaps and other information as long as it helps the members reach a decision. *See United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995). "The military judge may be an active participant in the proceedings, but 'must take care not to become an advocate for either party.'" *United States v. Merritt*, 71 M.J. 699 (A.F. Ct. Crim. App. 2012) (citing *United States v. Foster*, 64 M.J. 331, 332-33 (C.A.A.F. 2007)).

"There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings." *Id.* at 706 (citing *United States* v. *Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001)). "When a military judge's impartiality is challenged on appeal, [the test is] whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions.

Id. (citation omitted); *see also Acosta*, 49 M.J. at 18. We apply this test from the viewpoint of the reasonable person observing the proceedings. *Ramos*, 42 M.J. at 396. *See also Foster*, 64 M.J. at 333.

When viewing this judge's questions from the viewpoint of a reasonable person observing the proceedings, there is no doubt that the military judge maintained his role of impartiality. For example, during the defense's examination of Mr. MC about whether he had previously seen the appellant at his hotel, Mr. MC did not answer in a direct yes or no manner. An objective observer would not know whether Mr. MC was simply unsure if he saw the appellant at the hotel or if he was avoiding the question. The judge's question merely clarified that Mr. MC could not recognize the appellant and did not see him at the hotel. There is nothing indicating that the judge knew what the answer to his question would be. The response could have just as easily benefitted the defense.

The same is true with the judge's questions about whether the hotel records could be changed after a reservation is closed out, or why they appeared to show the appellant was charged six or seven days. If answered differently, there would have been evidence that the records could have been changed after the fact or the appellant had stayed there for at least some period. There is no indication that the judge knew what the responses to his questions would be.

The defense objected to the judge's questions at trial. After indicating they did not believe the judge was being impartial, they said, "It is our position that as the finder of fact that the members certainly had their ample opportunity, they could have asked and who knows if they would've or if they would not have asked, about that. And our position is you, as the judge, are not the trier of fact and are not responsible to clarify those issues. We believe that those questions potentially could close the door of an alternate explanation . . . ."

From this exchange, it is obvious that the defense would have been perfectly happy for certain facts to remain undeveloped for the members so they could argue an "alternate explanation" to the members. However we believe the judge was correct when he responded: "If I see issues that are murky, I want some clarity so the members have the facts so that they can then make an appropriate determination."

The defense's objection essentially is that, had the judge not asked his clarifying questions, ambiguities would have existed, allowing them to use those ambiguities or factual gaps to create doubt. However, there really were no ambiguities or factual gaps, and the judge's questioning made that apparent. It is proper for judges to clear up issues and further define the facts for the members as long as they do not abandon their role of impartiality. Although eliminating factual ambiguities may "close a door of an alternate explanation," the judge's role is not to protect these ambiguities to benefit either side. In this case, the judge's questions elicited definitive answers and facts useful to the

members and could have benefited either side, depending on the answer. He did not step out of his proper role of impartiality. Therefore, we find no merit to the appellant's first assigned error.

Instruction on Uncharged Misconduct

The appellant claims that the military judge should have instructed the members that the legitimate receipts from the All American Inn, which were submitted with the false receipts from the Candlewood Suites as part of the appellant's reimbursement claim, were not part of the false claim. The appellant argues that the judge should have stated with particularity the portions of the claim that the members "needed to find false and fraudulent." Accordingly, the defense argues the members were confused.

Whether members were properly instructed is a question of law we review de novo. *United States v. McDonald*, 57 M.J. 18 (C.A.A.F. 2002); *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999). The military judge has a sua sponte duty to instruct the members correctly and fully on all issues raised by the evidence. *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981) (citations omitted).

Because there were no objections to the instructions, we review for plain error. As our superior court stated, in *United States v. Clifton*: "Under a plain error analysis, this Court will grant relief in a case of nonconstitutional error only if an appellant can demonstrate that (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused." 71 M.J. 498, 491 (C.A.A.F. 2013) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)). *See also United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010); *United States v. Vazquez*, 72 M.J. 13, 17 (A.F. Ct. Crim. App. 2013).

There is no merit to this claim. The essence of this argument is that the judge confused the members by allowing the appellant's receipts for his stay at the base lodging facility, the All American Inn, to remain in the claim package that became Prosecution Exhibit 2, while failing to tell the members that this was not misconduct, and then instructing the members that they must find that the "entire" claim was false.

Prosecution Exhibit 2 was the appellant's claim for lodging and other expenses from 09 January 2008 to the end of the fiscal year, 30 September 2009. Two hotel receipts were attached to the claim: one for a stay at the All American Inn, beginning on 09 January and ending on 26 May 2008, and the other a false receipt created by Amn HA for the appellant, allegedly from the Candlewood Suites in Bordentown, New Jersey, covering the period from 26 May 2008 through 30 September 2008. The appellant's stay at the All American Inn occurred just before the fraudulent period beginning on 26 May 2008 and was not part of the charged misconduct. The defense essentially argues the members might have believed that the receipts from both facilities were fraudulent rather than just the latter. The error, they assert, is the judge's failure to give a limiting

instruction to the members on the use of the receipt from the All American Inn as well as giving the "entire claim" instruction.

A reading of the record indicates the prosecution never argued or suggested that the appellant's stay at the All American Inn was misconduct or part of the charged conduct. When Prosecution Exhibit 2 was admitted into evidence, trial counsel stated on the record that they would not argue the receipt from the All American Inn was evidence of misconduct and conceded it was not part of the larceny. It was merely admitted to show the entire story of the appellant's lodging arrangements while he was on active duty. The defense accordingly withdrew their objection to that receipt being submitted in the claim along with the fraudulent receipt.

Questions asked by the members during their deliberations confirm they understood that the receipt from the All American Inn did not represent misconduct. The questions were: "If lodging on base is correct, and if lodging off base is found to be false, does that constitute the entire claim as false? . . . Is a claim the travel voucher, accrual or individual claims, such as lodging?" Although this raised another issue discussed below, the question revealed the members knew that the receipt for base lodging was not misconduct. There was no argument or suggestion by the prosecution that the appellant's misconduct included his stay at the All American Inn nor was there any indication the members thought otherwise. Indeed, the receipt merely demonstrated the point at which the appellant transitioned from submitting a legitimate claim to submitting fraudulent claims, which coincided with when he moved to off-base quarters. This was made very clear to the members. The appellant has not pointed out, and we have not found, any prejudice resulting from the inclusion of the receipt or from a failure to give instructions limiting its use. We are convinced the members were not confused by the judge's instructions, and the appellant was not prejudiced.

The Additional Charge

Before the members began deliberations, the military judge instructed them on the elements of making a false claim. As part of those instructions, he told the members that they must find that, on divers occasions between on or about 9 January 2008 and on or about 12 March 2009, the accused made a certain claim against the United States, in the amount of more than $500 for lodging. As discussed earlier, he also instructed that they must find "the entire claim was false." In response to the member's question discussed above concerning the definition of "entire claim," the military judge re-instructed them on the elements of the offense of making a false claim and added additional instructions: "So I guess what I would point you to, words are important; phrases are important. It's the government's charging instrument. That is what the accused must defend against."

The military judge also instructed the members to the effect that they could make exceptions and substitutions on the findings worksheet and he tends not to give the

members "a lot of latitude" in that regard, but he did point out that they could find the amount was either above or below $500 or that the offense occurred on divers occasions or on one occasion. He also told them that he would provide additional sheets if they wanted to make additional adjustments. Finally, he told them to use their common sense as well as knowledge of human nature and the ways of the world in deciding whether it was the "entire claim," based on the definitions he gave them. The defense did not object to the additional instructions given to the members.

The defense now argues that, by telling the members that the charge as written by the prosecution was what the appellant "must defend against," they were dissuaded from making exceptions and substitutions, resulting in the outcome where they found the appellant guilty of the entire claim, including the charges from the All American Inn. This argument is a parallel to the assignment of error just previously discussed. It is claiming that, because of the judge's instructions, the members could have found the appellant guilty of uncharged misconduct, i.e., the charges for staying at the All American Inn.

Applying the same plain error standard as we did above, we find no error for much the same reason. The appellant is unable to point to any substantial right that may have been materially prejudiced. Based on the entire record, we are convinced the members were not confused. The defense invites speculation by arguing in its brief that "it is reasonable that the members concluded the entire claim may not have necessarily been false and fraudulent but since [the a]ppellant failed to properly defend against the specification as charged *and* since the members are unable to make any exceptions and substitutions to the specification, [the a]ppellant is guilty."

First, the appellant's claim that the members were unable to make any exceptions and substitutions to the specification is a clear overstatement. Although the judge said he tended not to give a lot of latitude, the members clearly were free to make exceptions and substitutions and the judge placed no specific limits on their ability to do so. Second, this statement conflicts with the defense's prior argument that the members could have believed his submission of a claim for staying at the All American Inn was part of the charged misconduct. Third, as stated previously, there is no reason to assume, and we do not believe that the members were confused or thought the appellant's stay at the All American Inn was part of his criminal conduct or that they found him guilty of that. Accordingly, we find no instructional error by the judge.

Confinement with Foreign Nationals

The appellant claims he is entitled to "judicial intervention" to redress his 75 days of confinement with foreign nationals. After his trial, the appellant was confined at the Monmouth County Correctional Institute in New Jersey from 11 March to 26 May 2011. During almost all of that time he was assigned to work in the "Clothing Room," where he

collected clothes from, and issued prison uniforms to new inmates. He also was responsible for feeding them. Some of these inmates included foreign nationals brought in by Immigration Customs Enforcement (ICE). The appellant did this work in the presence of a uniformed officer. He interacted with foreign nationals every day for 75 days. At times, he also was imprisoned with foreign nationals, including his first night where, while still wearing his uniform, he was placed in a common cell with prisoners brought in by ICE and harassed by them for being a military member. He was threatened and challenged to fight by some of them who also insulted him on the basis of his status as a United States service member.

Article 12, UCMJ, states: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces." We review de novo whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473-74 (C.A.A.F. 2007). "A prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." *Id*. at 469 (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). The purpose of this requirement is to promote the "resolution of grievances at the lowest possible level [] and ensure[] that an adequate record has been developed [] to aid appellate review []." *Id*. at 471 (quotation mark omitted) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)). "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id*. (citations omitted). The "[a]ppellant must show that absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [] in his [confinement] facility [] and that he has petitioned for relief under Article 138[, UCMJ, 10 U.S.C. § 938]." *Id*. (internal quotation marks omitted) (quoting *White*, 54 M.J. at 472).

The appellant claims he was unaware of Article 12, UCMJ, or of its prohibition of confinement with foreign nationals. Likewise, he claims he was unaware of the requirement to seek administrative relief at the detention facility or that he should have promptly petitioned for relief under Article 138, UCMJ, to address any violation.

Normally a confinee's failure to complain about Article 12, UCMJ, violations administratively, either through the confinement facility's grievance system or through the military chain via Article 138, UCMJ, will preclude judicial intervention. Only some unusual or egregious circumstance will justify an appellant's failure to exhaust his administrative remedies.

Our superior court found unusual circumstances in *Wise*, 64 M.J. 468. After Wise's conviction but before his confinement in a local facility near his camp in Iraq, which also housed either foreign nationals or enemy soldiers, he immediately complained of this potential Article 12, UCMJ, violation to his commander, other unit

representatives, and his defense counsel, all to no avail. Once he was placed in the facility, he was denied contact with his defense counsel. His attempts to complain to his guards were likewise met with silence. Finally, there was no evidence of a formal complaint or grievance system he could avail himself of while he was held in Iraq awaiting reassignment to the permanent confinement facility in Kuwait.

In *United States v. Alexander-Lee*, ACM S31784 (A.F. Ct. Crim. App. 16 March 2012) (unpub. op.), we found unusual circumstances existed when the appellant complained to his defense counsel that he was being bunked with foreign nationals in the local jail. By the time his defense counsel had spoken with prison officials and gotten back to the appellant, that circumstance had ended. The defense counsel had also told the appellant he would raise the matter to the convening authority for him. He did so in the clemency submissions. The appellant did not independently raise the Article 12, UCMJ, issue administratively.

We likewise found unusual conditions in *United States v. Brandon*, ACM 37399 (A.F. Ct. Crim. App. 22 March 2010) (unpub. op.), where the appellant, who was in a local civilian lock-up, had informed her defense counsel and her visiting commander of the Article 12, UCMJ, violation. The defense counsel included the issue in the member's clemency submission and her commander told her she could not be moved back onto base because of manning issues. The appellant did not independently raise the Article 12, UCMJ, issue administratively.

In all of these cases where unusual or egregious circumstances were found, the appellant had raised the Article 12, UCMJ, issue with someone connected with the military who would be in the position to relay the problem to an authority capable of remedying the situation. In those cases, this communication excused the appellant's failure to formally raise the issue administratively either through the facility grievance system or under Article 138, UCMJ.

The appellant in this case acknowledges he did not exhaust his administrative remedies, even though he had the opportunity to do so. There was a facility grievance system of which he was aware and the appellant was visited by military members, presumably from his unit. Yet, the appellant waited until appellate review before he raised the issue. He did not notify anyone in his chain of command or at the confinement facility of the Article 12, UCMJ, violation at the time it was allegedly occurring, nor did he file a grievance or make an Article 138, UCMJ, complaint. As a result, the Air Force was unable to investigate the claims, make a record of what they found, or immediately correct the situation, if warranted. With these facts, we find no "unusual or egregious circumstances" to excuse the appellant's failure to pursue available administrative remedies. *See Wise*, 64 M.J. at 471. Accordingly, based on the appellant's failure to exhaust his administrative remedies and the absence of unusual or egregious circumstances, relief for his claim of a violation of Article 12, UCMJ, is not warranted.

Cruel and Unusual Punishment

We review de novo whether the facts alleged constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006). This is also true for violations alleged under Article 55, UCMJ, 10 U.S.C. § 855. The same requirement to exhaust administrative remedies through the confinement facility grievance system or through Article 138, UCMJ, exists for this type of claim, as it does for claims for violations of Article 12, UCMJ, discussed in the previous section. *See Wise*, 64 M.J. 468. Thus, unless there are unusual or egregious circumstances explaining an appellant's failure to use these administrative avenues of redress, this Court will deny a belated request for relief at this level. *See id*.; *Miller*, 46 M.J. 248.

To prevail on this type of claim under an Eighth Amendment analysis, the appellant must show: (1) that prison officials committed a sufficiently serious act or omission that denied him necessities, (2) that the act or omission resulted from a culpable state of mind reflecting deliberate indifference to his health and safety, and (3) that he has exhausted administrative remedies. *Lovett*, 63 M.J. at 215.

The appellant bases his claim on the fact that he is a reserve Airman who, when not on active duty orders, is a "narcotics field officer" (police officer) in a city near the confinement facility he was held in for 75 days after his court-martial. He says it was foreseeable that he would be recognized by local people he had arrested and consequently he lived under a near-constant state of threat. He stated that there were rumors floating around as to his identity and he had to deny them when questioned by other inmates. Some of the inmates actually recognized him.

As discussed previously, the appellant did not exhaust his administrative remedies. In regard to this claim, he states that he could not use the confinement facility's grievance system because grievances were collected by the prisoners themselves, which eliminated any anonymity he would have and increased his risk. However, he stated in his post-trial declaration that he was asked directly by corrections officers if he was a police officer and he denied being one. This was an opportunity to bypass the anonymity problem with the grievance system. Additionally, he was visited by military members while in confinement, and he could have alerted them to his status but did not do so. Under these conditions, we find that the appellant did not satisfy the requirement to exhaust his administrative remedies.

Furthermore, there is no evidence that either the Air Force or the confinement authority possessed the "culpable state of mind reflecting deliberate indifference to his health and safety" required to show an Eighth Amendment violation. The appellant denied to the confinement authorities that he was a police officer when asked, so there would be no basis for them to take any action. To find that the Air Force possessed a

culpable mind, we would have to determine that they deliberately placed him in a confinement facility close to Philadelphia knowing he would be recognized by inmates he previously arrested. There is no proof of this and such a conclusion would require pure speculation on our part. Accordingly, we reject the appellant's Eighth Amendment violation claim.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[1] Though not raised as an issue on appeal, we note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).