**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Technical Sergeant TIMOTHY D. PIERCE**
**United States Air Force**

**ACM 35914**

**31 January 2006**

Sentence adjudged 29 August 2003 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Kevin P. Koehler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Alisa W. James, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The appellant was tried at McGuire Air Force Base, New Jersey, by a military judge sitting as a general court-martial. Contrary to his pleas, the appellant was convicted of one specification of failing to follow a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892; and four specifications of indecent acts in violation of Article 134, UCMJ, 10 U.S.C. § 934, three of which involved indecent acts with a child. The military judge sentenced the appellant to a dishonorable discharge, confinement for 14 years, and reduction to E-1. The convening authority approved the adjudged dishonorable discharge and reduction to E-1, but reduced the period of confinement to 10 years.

On appeal, the appellant asserts the military judge erred by refusing to dismiss the charges and specifications because the convening authority systematically excluded qualified first and second lieutenants from the court member selection process, in violation of Article 25, UCMJ, 10 U.S.C. § 825. The appellant also contends the post-trial processing period of nearly eight months between the announcement of sentence and action by the convening authority was excessive and unreasonable, thus warranting a substantial reduction in his sentence. We find no error and affirm the findings and sentence.

The issue of whether a court-martial panel was selected free from systematic exclusion is a question of law which we review *de novo*. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). This issue was thoroughly litigated at the appellant's trial and included consideration of the evidence and rulings in the contemporaneous (and unrelated) case of *United States v. Fenwrick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003), *pet. denied*, 60 M.J. 118 (C.A.A.F. 2004).[1]

The defense shouldered the burden of establishing the improper exclusion of qualified personnel from the court member selection process. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). They did not meet that burden. The military judge determined that the convening authority properly applied the criteria set out under Article 25, UCMJ, when he chose the panel in the appellant's case. He concluded: "I cannot find, based on his [the convening authority's] statement, his testimony [in *Fenwrick*], and the affidavit from the staff judge advocate, that there was any systematic exclusion of any particular class." We agree.

As to post-trial processing, the appellant calculates that 236 days elapsed between the announcement of his sentence and convening authority action. On the record before us, we find no violation of the appellant's due process rights and no basis to address post-trial delay in assessing sentence appropriateness. *See Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

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, 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.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[1] Although the military trial judge in *Fenwrick* found that qualified lieutenants had been systematically excluded from serving on the accused's court-martial panel, we later set aside the military judge's decision upon appeal by the government pursuant to Article 62, UCMJ, 10 U.S.C. § 862. *Fenwrick*, 59 M.J. at 743