IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Chief Warrant Officer Two (W-2) LAMONT S. JESSIE, United States Army, Appellant	) GOVERNMENT FINAL BRIEF)))) Crim. App. Dkt. No. 20160187)) USCA Dkt. No. 19-0192/AR))

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Issues Presented

WHETHER THE ARMY COURT ERRED BY CONSIDERING MILITARY CONFINEMENT POLICIES BUT REFUSING TO CONSIDER SPECIFIC EVIDENCE OF APPELLANT'S CONFINEMENT CONDITIONS.

WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A CONFINEMENT POLICY THAT BARRED HIM FROM ALL FORMS OF COMMUNICATION WITH HIS MINOR CHILDREN WITHOUT AN INDIVIDUALIZED ASSESSMENT DEMONSTRATING THAT AN ABSOLUTE BAR WAS NECESSARY.

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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II.

WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

III.

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault of a child over the age of 12 but under the age of 16 years, one specification of conduct unbecoming an officer, and one specification of adultery in violation of Articles 120b, 133, and 133, UCMJ, 10 U.S.C. §§§ 920b, 933, 934. (JA 33–35, 53). The panel sentenced appellant to be reprimanded, to be confined for four years, and to be dismissed from the service. (JA 30, 54). The Army Court, sitting *en banc*, issued a memorandum opinion affirming the findings and sentence on December 28, 2018. (JA 3–28). Appellate filed a Petition for Grant of Review and Supplement to the Petition on February 25, 2019 and a Motion to Supplement the Record on April 19, 2019. (JA 91). On July 11, 2019, this Court granted appellant's motion in part, supplementing the record with Defense Appellate Exhibits A–E, I–J, and M–N, and Government Appellate Exhibits A–C, and E. (JA 90). This Court granted appellant's petition for review on July 16, 2019. (JA 1).

Statement of Facts

I. Appellant's Offenses.

Appellant was convicted of two specifications of sexual assault of a child under 16, conduct unbecoming an officer, and adultery for the systematic sexual abuse of a 13-year-old military dependent and close family friend, TE. *United States v. Jessie*, ARMY 20160187, 2018 CCA LEXIS 609, slip op. at *1 (Army. Ct. Crim. App. Dec. 28, 2018) (mem. op.) (JA 29–30). Appellant and TE's parents served in the Army together for many years and grew close to the point that TE's parents became godparents to appellant's daughters and he was considered "uncle" to TE and her younger sister. (JA 56, 62). Appellant even donated sperm to TE's parents to help them conceive another child. (JA 75). Appellant was invited to live with TE's family as he prepared for an upcoming deployment during the summer of 2012. *Jessie*, slip op. at *2. Appellant was given a bedroom next to the children, on the other side of the house from the parents. (JA 57–59). Appellant's own young daughter began staying with the family shortly thereafter. (JA 58).

Appellant initiated a sexual relationship with TE shortly after he moved in with her family. *Jessie*, slip op. at *2. Within weeks, appellant engaged in digital, oral, and vaginal sex with TE approximately four times in multiple locations throughout the house, including the bed he shared with his own daughter. *Id*. at *2–3; (JA 67).

The sexual relationship continued after appellant's stay with TE and her family. *Jessie*, slip op. at *2. During appellant's deployment, he engaged TE with sexually charged communications via text message, video-chat, and phone calls. *Id*. Appellant and TE discussed their love for each other and hopes for a romantic future together. *Id*. Upon redeployment, appellant attempted to arrange for TE to visit him unescorted by her parents under the guise of babysitting his daughter, but TE's school schedule rendered the planned tryst unfeasible. *Id*. at *10; (JA 60, 68–69). Appellant was sentenced to a reprimand, dismissal from the service, and four years of confinement on March 24, 2016. (JA 30).

II. Joint Regional Confinement Facility Policy.

Appellant was transferred to the Midwest Joint Regional Confinement Facility (JRCF) at Fort Leavenworth, Kansas on March 24, 2016. *Jessie*, slip op. at *3. The child sex-offender visitation policy in place at the time, Military Correctional Complex Standard Operating Procedure 310 (the "policy"), precluded all child sex-offenders from any contact with any children absent an exception to policy approved by the prison commander. *Id*. Accepting responsibility for one's confining offenses and completing a sex offender treatment program were prerequisites for consideration of an exception to the policy. *Id*.

III. Appellant's Efforts at Redress.

On March 30, 2017, after more than one year at the JRCF, appellant

submitted an inmate request slip to the prison commander seeking information on obtaining an exception to the policy. (JA 110). A prison social worker responded on April 5, 2017, notifying appellant that he was currently ineligible to begin the qualifying sex offender treatment program because he had yet to accept responsibility for his confining offenses. (JA 110–11). On June 12, 2017, appellant lodged a request for redress under Article 138 of the UCMJ alleging that the policy violated his rights and asking for time off of his sentence. (JA 109). Appellant's commander responded to his Article 138 complaint on September 12, 2017, citing the facility's compliance with the policy and reminding appellant of the procedural mechanisms for obtaining an exception to policy. (JA 116).

IV. Appellant's Appeal.

On October 4, 2018, the Army Court heard oral argument on appellant's two assignments of error–constitutionality of the policy and post-trial delay. The Army Court had previously granted multiple motions by the parties to attach supplemental materials. In an *en banc* decision, the Army Court determined that resolution of appellant's First and Fifth Amendment claims in the context of sentence relief was "not an appropriate use of [its] Article 66(c) authority," rejected the claim of unreasonable post-trial delay, and affirmed the findings and sentence. *Jessie*, slip op. at *2. The majority also reconsidered the decision to grant the parties' motions to supplement the record and explained that the court

was exercising its discretion in choosing not to attach the materials or review appellant's constitutional claims for sentence appropriateness. *Id.* at *12 n. 14.

The policy has since been amended to permit application for exception after an individualized assessment of an inmate's risk level. *Id*. at *3. It is unknown whether appellant has had contact with his children per the amended policy. *Id*.

I.
WHETHER THE ARMY COURT ERRED BY CONSIDERING MILITARY CONFINEMENT POLICIES BUT REFUSING TO CONSIDER SPECIFIC EVIDENCE OF APPELLANT'S CONFINEMENT CONDITIONS.

Standard of Review

A Court of Criminal Appeals has "discretion to receive and consider evidence by affidavit, testimony, stipulation, or a fact-finding hearing, as it deems appropriate." *United Stated v. Boone*, 49 M.J. 187, 193 (C.A.A.F. 1998) (citing *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995). "[T]he Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority." Article 66(c), U.C.M.J., 10 U.S.C. § 866(c). This Court "will only disturb the Court of [Criminal Appeal]'s reassessment in order to 'prevent obvious miscarriages of justice or abuses of discretion.'" *United States v. Jones*, 39 M.J. 315, 317 (C.A.A.F. 1994) (citing *United States v. Dukes*, 5 M.J. 71, 73 (C.M.A. 1978) (additional citations omitted).

Law and Argument

a. Summary of Argument.

The Army Court was not required to attach or consider material beyond the record of trial in appellant's case. Accordingly, the lower court did not err by detaching extra-judicial materials sua sponte because, while the nature of appellant's claim may have permitted consideration of that information, it acted within its discretion by concluding that appellant's attachments were not necessary to decide the case.

b. Appellant's complaints are not in the record.

"Congress never intended that a Court of Military Review would be under any duty to receive additional information on sentencing after the convening authority had acted." *United States v. Healy*, 26 M.J. 394, 396–97 (C.M.A. 1988); *accord Boone*, 49 M.J. at 193 ("[*Healy*] lives in peace with our holding that consideration of sworn affidavits from counsel is a proper fact-finding act of a Court of Criminal Appeals."). The statutes governing the military post-trial and appellate processes delineate the respective powers of the convening authority and the service courts clearly:

> [T]he convening authority is not restricted to the transcript of testimony and allied papers, but may, in the colorful language of the late Judge Brosman, consult a "guy named Joe" for information regarding the penalty to be approved. On the other hand, the [service courts are]

> expressly restricted by Congress to "the entire record" in assessing the appropriateness of the sentence...In the absence of some clearly contrary declaration by law, the scope of their action should be limited to the boundaries defining the exercise of judicial power...[I]t appears that Congress, in conferring judicial character upon the [service courts], thought-fully [sic] sought to limit their charter of review to matters reasonably connected to the proceedings already completed in the cause.

United States v. Fagnan, 12 U.S.C.M.A. 192, 194 (1961) (citations omitted).

In *Fagnan*, the Army Court (then Army Board of Review) held that its Article 66(c) authority was "limited in its consideration of information relating to the appropriateness of sentence to matters included in the 'entire record.'" *Id*. at 195. *Fagnan* defined entire record as "encompass[ing] the transcript and the allied papers, as well as any appellate brief prepared pursuant to the terms of [UCMJ] Article 38," adding that "beyond these limits, the [service courts] may not go. *Id*. While decades of subsequent precedent have expanded the scope of review under Article 66(c) to include consideration of material necessarily beyond the record in certain cases, the basic precept established in *Fagnan* remains intact.

Appellant complains for the first time on appeal that his First and Fifth Amendment rights were violated while in confinement, attaching various prison forms, affidavits, and academic studies in support. (JA 101–185). Despite having been subject to the policy since the first day of his sentence, there is nothing in the

entire record regarding infringement of constitutional rights. Moreover, despite appellant's voluminous attachments, there is nothing outside the entire record that would mandate Article 66 review.

Appellant's reliance on *United States v. Gay*, 75 MJ 264 (C.A.A.F. 2016), is misplaced. As a predicate matter, appellant cites *Gay* to assert that complaints of post-trial confinement conditions unrelated to the Eighth Amendment are entitled to resolution by the service courts. Appellant's Br. 28. This position ignores the fact that, unlike *Gay*, appellant submitted nothing on the subject of confinement conditions in his Rule for Courts-Martial (RCM) 1105 matters despite having endured them for more than a year. *See United States v. Gay*, 74 M.J. 736, 739–41 (A.F. Ct. Crim. App. 2015) (basis for appellant's request for sentence relief timely raised in his clemency matters). It follows then, that unlike *Gay*, appellant's complaints were not considered and made part and parcel of the approved sentence at all. Consequently, appellant requests a sentence reassessment on an issue which, without good cause shown, was never submitted to the convening authority.

c. Appellant misconstrues precedent to assert that service courts must now treat all constitutional claims as Eighth Amendment challenges.

Appellant's claim centers on appellant's misapplication of *Gay* and related cases; it involves no assignment of error of such a nature that the service court is required to review post-trial materials. There are exceptions in which the service

courts *must*, necessarily, consider additional material and others in which this Court has held that a service court *may*. *See e.g. United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001) (must consider supplemental material for Eighth Amendment and Article 55[5] claims); *Boone*, 49 M.J. at 193 (must for ineffective assistance of counsel claims); *Gay*, 75 M.J. at 269 (may for solitary confinement); *United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007) (may for mandatory supervised release). Appellant's case does not fit, by any precedence, in either the "must" or the "may" category.

d. The Army Court is not required to consider material outside of the record in reviewing appellant's claims.

The Army Court did not have to consider appellant's submissions because he did not allege that he was subjected to cruel and unusual punishment during confinement. *See Jessie*, slip op. at *7. Because appellant failed to allege an Eighth Amendment or Article 55 violation, much less establish a prima facie case for it, the Army Court had no duty to review a hypothetical claim on its own accord. Appellant's contention to the contrary, that courts have a duty to ensure sentences are executed "in a manner consistent with Article 55 *and the Constitution*," ignores the limited holding of *United States v. White*. *See* 54 M.J. at

[5]The Supreme Court has distinguished three types of inmate claims of cruel and unusual punishment: denial of medical care, conditions of confinement, and excessive force. Appellant's case involves none of these. *See United States v. Kinsch*, 54 M.J. 641, 646–47 (Army. Ct. Crim. App. 2000).

475 (C.A.A.F. 2001) ("our holding is limited to the question whether the facts asserted by appellant constitute a constitutional or statutory violation."); Appellant's Br. 26. The Court of Appeals for the Armed Forces (CAAF)'s precedent creates a should address, not must address, situation in appellant's case. *See Jessie*, slip op. at *8; *Gay*, 75 M.J. at 269.

Healy is instructive on the Army Court's discretion to attach extra material to the record of trial. Appellant's efforts to distinguish his case from *Healy* accomplish the opposite goal. In *Healy*, the appellant attempted to supplement the record on appeal by attaching 25 documents purportedly on the issue of sentence appropriateness. 26 M.J. at 395. Finding the materials to be of the nature of clemency, the service court denied *Healy's* motion to attach. *Id*. Appellant cites *Healy* in an attempt to posit clemency as the lone carve-out for which service courts need not consider post-trial submissions given Congress' placement of that responsibility "in other hands." *Id*. at 396. As was the case with *Healy's* disguised clemency request, appellant asks military appellate courts to grant something they lack authority to give; therefore, post-trial submissions concerning First and Fifth Amendment claims as a subterfuge for injunctive relief are likewise irrelevant and this Court should either reach the same result as *Healy* or create new parameters.

A service court's duty to ensure that findings and sentences are correct in law does not extend to all disfavored confinement conditions, especially where

such conditions are not part of the approved sentence, do not amount to Eighth Amendment violations, and are in place by virtue of duly promulgated regulations and policies. The individualized impact of a particular confinement facility's administrative policies does not render a court-martial sentence incorrect in law, nor does it increase the punishment of a child sex-offender in any manner appropriate for Article 66 action. As such, the Army Court was not required to consider appellant's post-trial submissions concerning confinement conditions.

II.
WHETHER THE ARMY COURT CONDUCTED A VALID ARTICLE 66 REVIEW WHEN IT FAILED TO CONSIDER APPELLANT'S CONSTITUTIONAL CLAIMS.

Standard of Review

When reviewing sentence appropriateness, a service court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), U.C.M.J. This Court's review of post-trial confinement conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence. *See* Article 67(c), U.C.M.J. 10 U.S.C. § 867(c); *Pena*, 64 M.J. at 264. This Court reviews a court of criminal appeal's sentence appropriateness determination for abuse of discretion. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010).

"The scope and meaning of Article 66(c) is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." *Gay*, 75 M.J. at 267 (citation omitted). "The language of Article 66(c) states that a CCA 'may' approve only that part of a sentence that it finds 'should be approved.' The statute clearly establishes a discretionary standard for sentence appropriateness relief awarded by the Courts of Criminal Appeals." *Id*. at 268 (citing *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (recognizing that "the sentence review function of the Courts of Criminal Appeals is highly discretionary.").

Law and Argument

a. Summary of Argument.

The Army Court was not required to consider evidence of appellant's confinement conditions nor resolve his complaints as part of its Article 66(c) review because those claims do not relate to a legal deficiency in his sentence and the service courts lack authority to grant appropriate relief. "The question of whether a change in the form of punishment increases the severity of the punishment is contextual, requiring consideration of all the circumstances in a particular case. The foregoing considerations apply only to matters that constitute 'punishment' within the meaning of the criminal law. As a general matter, the collateral administrative consequences of a sentence, such as early release

programs, do not constitute punishment for purposes of the criminal law." *Pena*, 64 M.J. at 265 (citation omitted).

b. The Army Court conducted a valid Article 66 review.

The authority bestowed on the service courts under Article 66(c) is not without boundaries and the "plain words of the statute" limit review to matters relating to the correctness in law of the findings and sentence of the court-martial. *Fagnan*, 12 U.S.C.M.A. at 195. Here, appellant asked the Army Court to stray outside its statutory lane and meddle into a prison policy in a manner similar to *United States v. Haymaker*, 46 M.J. 757 (A.F. Ct. Crim. App. 1997), where a prisoner requested a sentence reassessment due to unsatisfactory medical care during confinement. Although the Air Force Court of Criminal Appeals (Air Force Court) held that it need not decide the jurisdictional issue due to appellant's failure to make a facial claim under the Eighth Amendment, its analysis is useful to the question pending before this Court:

> It follows that, to achieve a remedy tailored to the specific inadequacy alleged, the complaint should be brought to the forum or tribunal best positioned to do so…appellant is asking us to pound a square remedy into a round injury.

Id. at *9. Article I courts lack the ability to address all prison complaints.

Moreover, the suggestion that the Army Court has a duty to read into "the sentence as approved" any and all claims of "post-trial violations of the accused's

rights" is baseless. Appellant Br. 27 (citing *United States v. Banks*, 75 M.J. 746 (Army. Ct. Crim App. 2016)). Ironically, appellant relies on *Banks* to make this point, glossing over the fact that the post-trial complaints it dealt with had already been presented to the convening authority, thus making them part of "the sentence 'as approved.'" *Id*. at 752. The courts of criminal appeals are charged with reviewing findings and sentences and affirming only those they determine to be correct in law and should be approved, based on the record. Article 66(c), UCMJ. Appellant asks this Court to expand the basic charter of the lower courts with a directive to wade into administrative areas unknown as part of their review, regardless of the nature of a constitutional complaint, despite the inability of such courts to do anything about the offending condition. No authority yet exists to support this sweeping change.

c. Appellant's complaints do not relate to the correctness in law of the findings or sentence in his case.

Service courts are not required to determine the appropriateness of a sentence merely based on a bald claim of legal deficiency. Correctness in law with respect to findings and sentences does not automatically extend to any constitutionally-based complaint. As pointed out by the Army Court, "[a]ll manner of problems can be framed as a legal deficiency." *Jessie,* slip op. at *7 n.8 (citing *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1255–56 (D. Kan. 1999) (where military

prisoners at the United States Disciplinary Barracks sought various forms of relief in federal district court for a laundry list of confinement conditions, including alleged First and Fifth Amendment violations).

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. The UCMJ expressly incorporates Eighth Amendment principles into Article 55, addressing specific application to a military setting. *See* 10 U.S.C. § 850. *See also Kinsch*, 54 M.J. at 646 (holding the service courts' "congressional mandate" under Article 66(c) "includes the enforcement of the UCMJ's prohibition against the infliction of cruel and unusual punishment" and consideration of such "issues in the course of normal appellate review."). Congress has also expressly prohibited sentences to solitary confinement, as well as any treatment inconsistent with civilian penal standards. *See* Rule for Courts-Martial (R.C.M.) 1003(b)(7); Article 58(a), U.C.M.J., 10 U.S.C. § 858.

The CAAF has specifically held that certain confinement conditions create a legal deficiency sufficient to trigger automatic Article 66(c) review and warrant potential sentence relief. *See generally White*, 54 M.J. at 469 (Eighth Amendment claim related to harassment and intimidation by prison guards); *Erby*, 54 M.J. at 476 (Eighth Amendment claim for similar conduct by guards). In *White*, this Court held that the Air Force Court erred by concluding it lacked jurisdiction to hear the appellant's claim of cruel and unusual punishment but ultimately found those

claims did not amount to an Eighth Amendment or Article 55 violation. *See* 54 M.J. at 475. In *Erby*, this Court held that the Air Force Court committed the same error but, lacking sufficient information in the record to resolve the Eighth Amendment question, remanded the case for additional fact-finding. *See* 54 M.J. at 478–79. In both cases, the appellant invoked the necessary constitutional and statutory framework to compel consideration of the supplemental materials needed to decide the question. In this case, appellant does not.

Since appellant's case does not implicate the Eighth Amendment or Article 55, military appellate courts are left with only the lens of sentence appropriateness, which is the exclusive business of the service courts absent legal error. The CAAF has further held that the service courts may, within their discretion, review certain post-trial confinement conditions not rising to the level of cruel and unusual punishment which inherently necessitate supplementation of the record. *See Pena,* 64 M.J. at 259 (rigorous provisions of mandatory supervised release); *Gay*, 75 M.J. at 264 (arbitrary placement in solitary confinement). This Court has not, however, ever mandated a wholesale expansion of the service courts' duties under Article 66(c) to do so with respect to any and all constitutional complaints, as appellant suggests. Appellant's Br. 26. In fact, the CAAF has set no parameters specifying which conditions not amounting to cruel and unusual punishment must be reviewed.

d. Appellant's confinement conditions are distinguishable from those found to warrant Article 66 review.

In *Gay*, this Court held that the Air Force Court did not abuse its discretion when it chose to receive supplemental material as part of its Article 66(c) review of a case involving an airman's unnecessary placement in solitary confinement. *Id*. at 265. While finding that *Gay's* arbitrary placement in solitary confinement did not rise to the level of an Eighth Amendment or Article 55 violation, the Air Force Court determined that *Gay's* treatment was an unreasonable increase of his punishment and reduced his term of confinement. *See Gay*, 74 M.J. at 743. The service court found the situation deserving of relief for several reasons:

> 1. No valid reason [was] offered for placing [Gay] in solitary confinement...
> 2. If [Gay] was placed in solitary confinement solely to prevent him from being housed with a foreign national, th[at] d[id] not constitute acceptable reason for placing him there.
> 3. The unrebutted assertion…that some Air Force official directed [Gay] to be placed in solitary confinement.
> 4. When unit leadership complained to [the facility], [Gay] was easily transferred to another pod that did not contain foreign nationals.

Id. (citations omitted).

The CAAF, acknowledging the discretionary nature of the service courts' Article 66 review authority, crafted its holding carefully:

> In reaching this conclusion, *we do not recognize unlimited authority* of the Courts of Criminal Appeals to grant sentence appropriateness relief *for any conditions of post-trial confinement of which they disapprove*. Rather, we hold that the Air Force Court of Criminal Appeals' *decision* to grant sentence appropriateness relief *in this case* was based on a legal deficiency in the post-trial process and, thus, was clearly authorized by Article 66(c).

Gay, 75 M.J. at 269 (emphasis added).[6]

Pena involved a claim of cruel and unusual punishment for cumbersome restrictions attendant to a mandatory supervised release program. *See* 64 M.J. at 263. In that case, after serving all but 72 days of his sentence, appellant was forced to begin a program requiring completion of a two-year sex-offender treatment course at his own expense, consent to installation of monitoring devices in his personal computer, abstention from alcohol and pornography, and participation in Alcoholics Anonymous, among other conditions. *Id*. *Pena* objected to his forced participation in the program citing extreme personal and financial hardship but was denied. *Id*. at. 264–65. The service court permitted submission of additional material but held that *Pena* failed to make a facial showing of either cruel and usual punishment or impermissible increase in adjudged punishment; this Court affirmed. *Id*. at 266–67.

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[6] The CAAF also found legal error warranting potential sentence relief based on Article 58(a), UCMJ, given *Gay's* experience compared to the treatment standards expected in civilian prisons. *Id*. at n. 6.

Not all deprivations experienced in confinement have a bearing on punishment. A prisoner, by virtue of having been convicted and sentenced to incarceration, necessarily experiences limitations on his or her constitutional rights. *See e.g., United States v. Felicies*, 2005 CCA LEXIS 124, *36 (N.M. Ct. Crim. App. 27 Apr. 2005) (correspondence limitations); *Marrie*, 70 F. Supp. 2d at 1255 (reduced privacy in cells, bathrooms and showers); *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (curtailment of association rights as expected consequence of confinement). The harsh realities of incarceration do not automatically entitle those who experience them to judicial intervention or relief. *See generally Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (stating "[t]he Constitution does not mandate comfortable prisons" in an Eighth Amendment based suit for injunctive relief alleging failure of prison officials to safeguard a transsexual inmate).

In this case, appellant was deprived of contact with his children due to a policy governing child sex-offender access to minors during confinement. Appellant was not tortured, randomly ordered into solitary confinement, or saddled with overly burdensome conditions upon release. While unpleasant, appellant's hardships are those fundamentally incident to the circumstances of confinement for his particular offenses and, absent binding authority, not entitled to mandatory Article 66(c) review.

e. Gay's holding imposes no requirement on the service courts to receive additional material or review appellant's constitutional claims.

This Court's holding in *Gay*–that there was no abuse of discretion for one service court to conduct a review–does not establish a reverse obligation on the others. The court in *Jessie* correctly interpreted its "discretionary sentence appropriateness authority," distinguished the present case from *Gay*, and declined to review the confinement conditions as was in its discretion.[7] *Jessie,* slip op. at *5 (quoting *Gay*, 75 M.J. at 269). Notably, unlike here, where the Army Court was asked to scrutinize an administrative access policy, equally applicable to all similarly situated inmates and adhered to by the facility, *Gay* involved prison procedures arbitrarily deviated from which directly impacted the physical execution of the sentence in direct contravention of the Manual for Courts-Martial. *Id*. at 8. The Army Court added further justification to support the exercise of its discretion not to engage appellant's challenges to the policy, to include its lack of expertise in the area and belief in the futility of review given its complete lack of ability to cure the situation even were it deemed meritorious. *Id*.

[7] First, *Gay* submitted evidence of his placement in solitary confinement in contravention of prison policy in his RCM 1105 matters whereas appellant's complaint was presented for the first time on appeal despite being subject to the policy for over a year prior. Second, *Gay's* treatment in confinement directly violated RCM 1003(b)(7) which states, "a court-martial shall not adjudge a sentence to solitary confinement." *Gay*, 75 M.J. at 269.

Further, while *Gay* may permit, rather than direct, the service courts to consider post-trial matters as part of their Article 66(c) review, they should only exercise their authority to grant sentence relief based upon conditions of post-trial confinement not amounting to an Eighth Amendment or Article 55 violation in "very rare circumstances." *United States v. Trebon*, 2017 CCA LEXIS 473, *8 (A.F. Ct. Crim. App. 14 July 2017); *United States v. Milner*, 2017 CCA LEXIS 84, *13 (A.F. Ct. Crim. App. 7 Feb. 2017).

Appellant's case is similar to *Trebon* and *Milner* in which the Air Force Court declined to exercise its authority to grant sentence relief for post-trial confinement conditions per *Gay*. As here, appellants in those cases erroneously cited *Gay* to support their claims of entitlement to Article 66(c) relief due to their respective deprivation of privileges during confinement resulting from segregation from the general population. 2017 CCA LEXIS 473, *8 (*Trebon* spent 203 days in Male Special Quarters at Naval Consolidated Brig-Miramar); 2017 CCA LEXIS 84, *13 (*Milner* spent 25 days in area used exclusively for Air Force prisoners at a county detention center). In both cases, the Air Force Court rejected the appellants' Article 66(c) arguments after exposing their misstatement of *Gay*:

> However, the CAAF noted that *Gay* involved unique facts driven by legal errors in the post-trial process that included both a violation of the appellant's rights under Article 12, UCMJ, 10 U.S.C. § 812, and the ordering of solitary confinement by an Air Force official where an

> alternative solution was available. Significantly, the CAAF emphasized, "**In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove.**"

Trebon, 2017 CCA LEXIS 473, *8; *Milner*, 2017 CCA LEXIS 84, *13 (identical language) (citations omitted) (emphasis added).

f. Service courts are not the proper forum for changing administrative policy.

The service courts lack authority to grant a proper recourse in this case because the appropriate remedy for a policy deemed unconstitutional would be injunctive relief. Injunctive relief would balance a prisoner's rights with the government's societal interests in rehabilitating and punishing criminal malfeasors. Appellant's proposed solution would result in a windfall because, if granted, he would not only gain freedom of association with his minor children, he would regain all of his freedoms by virtue of a shortened period of confinement.

The Army Court correctly concluded that curtailment of appellant's sentence was not an appropriate form of relief for the challenged issue. The service courts are in the business of conducting sentence appropriateness review and are afforded considerable discretion toward that end. *See Gay*, 75 M.J. at 268. In this case, the Army Court chose not to consider appellant's claims under its Article 66 lens as it concluded that to do so would itself be inappropriate because, among other reasons, the only proper remedy is one it cannot give. *See Jessie*, slip op. at *4.

This is because while Article I courts in particular "have no authority to direct change to the policies of a military confinement facility...supervise the practice of military justice generally...or order injunctive relief," the courts in general "are ill-equipped" to "second-guess" prison administrators and should afford significant deference accordingly. *Id*.; *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (citations omitted). Lastly, the Army Court rightly noted that to grant relief under these circumstances would implicitly require it to say what the policy should be, something it could not rightly do. *Jessie,* slip op. at *8.

g. *Granting sentence relief under Article 66 in appellant's case would create an absurd result.*

Article I courts lack the authority vested in Article III courts to grant equitable relief, including injunctive relief. *See* U.S. Const., art. III, § 2, cl. 1. *but see* Article 66(c), U.C.M.J.; Article 67(c), U.C.M.J. However, military prisoners are not without recourse as they remain free to access Article III courts to seek injunctive or declaratory relief for oppressive prison conditions. *See Walden v. Bartlett*, 840 F.2d 771, 774–75 (10th Cir. 1988); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.") (citations omitted). This Court should affirm the Army Court because what appellant seeks of it amounts to

nothing more than a veiled request for clemency, the granting of which would create an absurd result. *See Jessie,* slip op. at *13 ("[W]e would actually go beyond the outer edge of our Article I jurisdiction if we were to reduce appellant's sentence...") (Febbo, J., concurring).

Appellant's request is not actionable by Article I courts for two reasons: First, it is a disguised request for clemency; and second, it invites the courts to perform a legal review of an administrative prison policy, a task for which the Supreme Court has made abundantly clear it is unsuited. *See Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (counseling deference to prison administrators because "the 'problems of prisons in America are complex and intractable,' and because courts are particularly "ill-equipped' to deal with these problems.") (citations omitted). The *Jessie* concurrence goes on to extrapolate the Pandora's Box such precedent would open, inviting service courts to declare pronouncements of the Bureau of Prisons and various state agencies constitutionally invalid, all the while lacking the power to do anything about it. *See Jessie,* slip op. at *13.

Appellant seeks clemency, in the form of a reduced term of confinement, simply because he has children. (JA 31). He requests expedited return to his children without mention that the practical effect would be to restore him to the full multitude of rights, liberties, and privileges he currently lacks as a consequence of his lawful conviction. Indeed, absent from appellant's request is

any regard for the inequity of the application of his logic to prisoners without children. Appellant's argument is silent with respect to the unknown masses of childless child sex-offenders, past and present, left to serve their full sentences separated from all of the freedoms, unrelated to the offending policy, to which appellant would become an immediate beneficiary. The discordant result of this personal windfall to appellant would not be the only dire consequence of the dangerously expansive use of Article 66 which he proposes.

Additionally, subsequent changes to the policy, likely to have already ameliorated appellant's plight, yield another basis for finding sentence relief unwarranted in this case. Sentence relief is imprudent in such cases because it is a permanent change to a fluid circumstance. By appellant's logic, an inmate subject to an offending policy for even one day could receive full relief.

The *Jessie* court acted within its discretion by refusing to review appellant's claims for sentence appropriateness, noting that it operates under no obligation to do so and declining to "use its authority as a policy-changing tool." *Id*. at * 8. Regarding the Supreme Court framework for resolving constitutional complaints in the prison context not amounting to Eighth Amendment violations, the concurrence rightly opined that such tests are designed for courts with the power to actually do something about that which they might find unconstitutional. *See Id*. at *13.

III.
WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY A CONFINEMENT POLICY THAT BARRED HIM FROM ALL FORMS OF COMMUNICATION WITH HIS MINOR CHILDREN WITHOUT AN INDIVIDUALIZED ASSESSMENT DEMONSTRATING THAT AN ABSOLUTE BAR WAS NECESSARY.

Standard of Review

When reviewing sentence appropriateness, a service court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), U.C.M.J.

[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). "[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates...when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id*. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974)).

Law and Argument

a. Summary of Argument.

Appellant's constitutional claims are without merit and should not be addressed by this Court because, even assuming the policy did infringe on his First and Fifth Amendment rights for a period of time, they simply do not relate to the correctness in law of the sentence. In other words, appellant's First and Fifth Amendment rights were not violated by the policy, and, even if they were, the Army Court was not required to scrutinize his claims under Article 66 as it lacks the authority to provide tailored relief.

b. The Court need not address appellant's constitutional claims because they have no bearing on the correctness in law of the findings and sentence.

Appellant's complaints are not entitled to mandatory review under Article 66(c) because they do not relate to correctness in law, the threshold issue for review. While appellant attempts to wedge his personal plight into the scope of automatic review with comparisons to Eighth Amendment cases or other carve-out situations wherein prison officials *deviated from* a policy in order to single out an inmate in a manner resembling increased punishment, the individual impact of an administrative policy uniformly applied is beyond the ambit of Article 66.

c. The policy does not violate appellant's constitutional rights.

Limitations on appellant's First and Fifth Amendment rights while in prison are valid consequences of his lawful confinement. The Supreme Court conveys wide latitude to prison officials to promulgate regulations without judicial interference, acknowledging that "constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw*, 532 U.S. at 228. "The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner." *Overton*, 539 U.S. at 131. Accordingly, courts apply a four-factor analysis for reviewing prison policies that limit constitutional rights rather than strict scrutiny. *See Turner,* 482 U.S. at 78. However, the *Turner* test is designed for courts with the authority to grant actual relief corresponding to the offending prison rule. *See Jessie*, slip op. at * 14 (Febbo, J., concurring).

Turner is a judicial restraint case in which the Supreme Court created a "lesser standard of scrutiny for determining the constitutionality of prison rules." *Id*. at 81. In *Turner*, state prisoners in Missouri sought an injunction in federal district court challenging institutional restrictions on their rights to correspondence and marriage. *See Id*. The Supreme Court held that a reduced standard was appropriate in deference to prison officials on the basis that they are better suited to the business of prison operations. *See Id.* at 89–90; *see also Jones,* 433 U.S. at 128

(deferential scrutiny designed to ensure "prison administrators..., and not the courts, [] make the difficult judgments concerning institutional operations."); *Overton*, 539 U.S. at 132 ("[C]ourts owe substantial deference to the professional judgment of prison administrators."); *Beard v. Banks*, 548 U.S. 521, 536 (2006) ("Judicial scrutiny of prison regulations is an endeavor fraught with peril.") (Thomas, J., concurring); *Wirsching v. Colorado*, 360 F.3d 1191, 1193 (10th Cir. 2004) (rejecting First and Fifth Amendment complaints for prisoner denied visitation with his minor child based "primarily upon the deference we afford to prison administrators in these matters.").

The first *Turner* factor asks courts to consider whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (internal citations omitted). Prisoners' rights are not violated unless the rational connection is so attenuated as to render the policy "arbitrary or irrational." *Id*. at 90.

The remaining *Turner* factors consider the availability of alternative means of exercising the right, the impact that accommodating the asserted right would have on the prison facility, and whether there are "ready alternatives" to the regulation. 482 U.S. at 89–91. However, not all of these factors are created equally, as the true strength of a challenged policy rests on the relationship of the restriction to its asserted goals. *See Beard*, 548 U.S. at 533. ("In fact, the second,

third, and fourth factors, being in a sense logically related to the policy itself, here add little, one way or another, to the first factor's basic logical rationale...the real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation.") (emphasis in original).

When considering a policy that limits a prisoner's First Amendment rights, this Court should also consider that the right of freedom of association "is among the rights least compatible with incarceration." *Overton*, 539 U.S. at 131. Central to the first *Turner* factor's analysis in appellant's case is the fact that the policy applies to all child sex-offenders rather than the entire prison population or to hand-selected inmates. This distinction is critical. *See Wirsching*, 360 F.3d at 1205 ("treating sex offenders differently than others not convicted of these crimes is rationally related to a legitimate state objective."); *United States v. Green*, 2007 CCA LEXIS 475 (A.F. Ct. Crim. App. 12 Oct. 2007), *10 (finding similar policy reasonably related to the penological interests of providing "a wide net of protection to minors" and confining a "carefully defined segment of the prison population."). As in *Overton* and *Beard*, appellant's deprivations were imposed only on a specific segment of the prison population by officials whom, "relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives." *Beard*, 548 U.S. at 533

(comparing its First Amendment restriction on newspaper access to the more "severe" restriction on family visitation privileges for inmates with substance abuse issues upheld in *Overton*).

In the summer of 2012, appellant was a 37-year-old man who leveraged his "close as family" dynamic with the victim and her family in order to isolate and sexually exploit a 13-year-old girl. *See Jessie*, slip op. at *2–3; (JA 56–60, 67–69, 75). Further, appellant used one of his biological daughters to screen his predatory motives, both when living with TE's family and again when scheming to secure total access to her upon redeployment. *See Jessie*, slip op. at *10. As a consequence of his conviction for these crimes, appellant was sentenced to confinement at a military facility with a restrictive child access policy for a distinct segment of the prison population–child sex-offenders. The policy, crafted in consultation with prison administrators and social scientists alike, resulted in the total denial of contact with children, inherently disruptive to the First Amendment rights enjoyed by those not convicted of sexually assaulting children. (JA 190). While any detrimental impact on the parent-child relationship is as regrettable as it is ironic (appellant showed through his actions a complete disregard for any healthy parent-child relationship), appellant's plight serves as one of many examples of the liberties surrendered as a consequences of lawful confinement.

The policy in this case was crafted to serve the interests of protecting children and rehabilitating child sex-offenders. (JA 192). The restrictions associated with the policy are reasonably related to these penological interests in that it creates a safeguard against those convicted of preying sexually on children until such time as they have taken both responsibility and meaningful steps to examine their mindset with respect to minors. (JA 193). While appellant submits a litany of exhibits and counter-studies to undermine the policy's nexus to these undisputedly legitimate penological interests, the JRCF need not adopt the best or least restrictive policy under the *Turner* standard. *See* 482 U.S. at 90. The question remains whether the policy is "rationally related" to a legitimate penological interest, not whether it conforms to the "best practices" of other types of prison systems charged with confining other types of prisoners.

The consequences of appellant's refusal to admit to his confining offenses were not so severe as to likely compel him to be a witness against himself for Fifth Amendment purposes. This case is similar to *Wirsching*, in which a Kansas prison policy which precluded direct contact between child sex-offenders and children was held not to violate the First and Fifth Amendment. *See* 360 F.3d at 1193. As here, the appellant in *Wirsching* was convicted of sexually assaulting a minor and subsequently denied visitation with his biological children in confinement unless he participated in a treatment program requiring him to take responsibility for his

crimes. *Id*. By refusing to participate, *Wirsching* was further denied the opportunity to earn good time credits at the higher rates available to treatment program participants. *Id*. He challenged the Colorado policy on First, Fifth, Eighth, and Fourteenth amendment grounds; the Tenth Circuit rejected each claim, citing *Turner* and the more recent Fifth Amendment case of *McKune v. Lile*, 536 U.S. 24 (2017).

In *McKune,* the Supreme Court reversed a Tenth Circuit decision applying a Fifth Amendment bar to "a Kansas prison policy restricting an inmate's privileges and transferring him to a maximum security prison after he refused to disclose his sexual history." 536 U.S. at 29–30. The Court concluded that the appropriate standard for determining impermissible compulsion in a prison context was whether "the consequences constituted 'atypical and significant hardships in relation to the ordinary incidents of prison life.'" *Id*. (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Justice O'Connor concurred, opining that the consequences of the *McKune* appellant's refusal to incriminate himself were not "so great as to constitute compulsion for purposes of the Fifth Amendment privilege against self-incrimination." *Id*. at 49–50 (O'Connor, J., concurring). In *Wirsching*, *McKune* and appellant's case, tough policies enacted to address tough issues involving this specific group of offenders have validly presented inmates with a tough choice–not

compulsion–between accepting responsibility and serving out their remaining periods of incarceration under existing rules.

There is no First Amendment violation in this case because appellant's freedom of association, a right inherently affected by incarceration, has been curtailed by prison officials with a valid reason to keep him from children. There is no Fifth Amendment violation because being incentivized to accept responsibility for a crime, while serving time for that offense, is not compulsion.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny appellant's requested relief.

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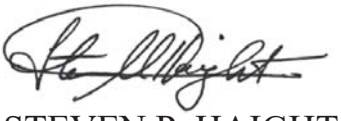

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,759 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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September, 2019

Appendix to Appellee's Brief

United States v. Felicies

United States Navy-Marine Corps Court of Criminal Appeals

April 27, 2005, Decided

NMCCA 9900206

Reporter
2005 CCA LEXIS 124 *; 2005 WL 958397

UNITED STATES v. Joseph FELICIES, Lance Corporal (E-3), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by *United States v. Felicies, 61 M.J. 336, 2005 CAAF LEXIS 805 (C.A.A.F., 2005)*

Review denied by *United States v. Felicies, 2006 CAAF LEXIS 365 (C.A.A.F., Mar. 21, 2006)*

Prior History: Sentence adjudged 30 March 1998. Military Judge: R.E. Hilton. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Force Service Support Group, U.S. MarForLant, Camp Lejeune, NC.

Core Terms

pretrial, confinement, sentence, conditions, Attachment, co-conspirators, military, offenses, charges, disparate, cruel and unusual punishment, pretrial confinement, ineffective, custody, inmates, regulations, convening, contends, prison, assigned error, classification, guilty plea, circumstances, court-martial, submissions, confession, post-trial, quarters, issues, stolen

Case Summary

Procedural Posture
Appellant servicemember was convicted of numerous offenses, including, inter alia, two specifications of attempted robbery, four specifications of conspiracy to commit robbery, two specifications of wrongful distribution of marijuana, and three specifications of robbery. He was sentenced to confinement for 20 years, total forfeitures, and a dishonorable discharge. The convening authority approved the sentence as adjudged. He appealed.

Overview
Appellant contended that he received ineffective assistance of counsel, illegal pretrial punishment, an unduly severe and disparate sentence, an unreasonable multiplication of charges, and cruel and unusual post-trial punishment. Under Strickland, the court found no merit in his ineffective assistance contentions. Appellant also asserted that he was denied the right to counsel, but this contention was based solely on the military judge's refusal to immediately release his detailed defense counsel and individual military counsel during the second preliminary "Article 39(a)" session. The court rejected his claim that he suffered pretrial punishment as a result of being placed in pretrial confinement in maximum security at the Camp Lejeune Base Brig. He also contended that his sentence was inappropriately severe and disparate to that of a co-conspirator. The court disagreed. On other matters, it also disagreed with appellant that the specifications under Charge V, involving receiving and transporting a stolen car, represented an unreasonable multiplication of the charges, and, finally, it determined that he failed to demonstrate that he was subjected to cruel and unusual punishment.

Outcome
The findings and sentence, as approved by the convening authority, were affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > Preliminary Proceedings

Military & Veterans Law > Military Justice > Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Constitutional Right

Military & Veterans Law > Military Justice > Judicial Review > Appellate Counsel

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1[] Assistance of Counsel

The *Sixth Amendment* guarantees an accused the right to assistance of counsel, which Congress has codified for military personnel in Unif. Code Mil. Justice art. 27, *10 U.S.C.S. § 827*. This right to effective assistance of counsel covers the pretrial, trial, and post-trial stages. However, this right to the assistance of counsel does not guarantee a "meaningful relationship" between an accused and his counsel. As a result, on claims of ineffective assistance of counsel, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2[] Tests for Ineffective Assistance of Counsel

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

HN3[] Costs & Attorney Fees

The Strickland standard is applicable to military cases. Counsel are strongly presumed to be competent in the performance of their duties. Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency. Thus, in order to demonstrate ineffective assistance of counsel, an appellant must surmount a very high hurdle.

Military & Veterans Law > Military Justice > Disclosure & Discovery > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4[] The United States Court of Appeals for the Armed Forces has set forth the following three-part test for evaluating whether the strong presumption of competence has been overcome: (1) are the appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? and (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Military & Veterans Law > Military Justice > Counsel

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pretrial Proceedings

HN5 **Counsel**

A failure to investigate before advising an accused may constitute ineffective assistance where the accused provides counsel with specific names of exculpatory witnesses.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN6 **Discovery Misconduct**

Broad assertions of inadequate investigation and preparation, by themselves, do not meet an appellant's burden to establish deficient performance.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Entry of Pleas > Types of Pleas > Conditional Pleas

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Military & Veterans Law > ... > Trial Procedures > Pleas > General Overview

HN7 **Admissions & Confessions**

Unconditional guilty pleas waive all suppression issues pursuant to Mil. R. Evid. 304(d)(5) and 311(i), Manual Courts-Martial (1998).

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN8 **Standards of Review**

Appellate courts will not second-guess the strategic or tactical decisions of defense counsel.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

HN9 **Courts of Criminal Appeals**

Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. The burden of proof is on the appellant to show a violation of Unif. Code Mil. Justice art. 13, *10 U.S.C.S. § 813*. This article prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial; i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military

Justice > Apprehension & Restraint of Civilians & Military Personnel > General Overview

HN10 **Courts of Criminal Appeals**

The "punishment prong" of Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813, focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. When an arbitrary brig policy results in particularly egregious conditions of confinement, the court may infer that an accused has been subject to pretrial punishment. However, if the conditions of pretrial restraint were reasonably related to a legitimate government objective, an appellant will not be entitled to relief.

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > General Overview

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN11 **Confinement**

The placement of a detainee in solitary confinement simply because of the seriousness of his offense does not violate Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813, in the absence of any evidence showing an intent to punish. Moreover, the nature and seriousness of the offenses and the corresponding length of potential confinement are relevant factors that brig officials may consider in determining whether to place a detainee in special quarters.

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN12 **Cruel & Unusual Punishment**

The plain language of both U.S. Const. amend. 8 and Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855, refers to adjudged punishment rather than pretrial confinement. Pretrial confinement is not "punishment" unless it is unlawfully administered. Thus, an appellant's failure to meet his burden under § 855, to show pretrial punishment also resolves the question whether the conditions of his confinement amounted to "cruel and unusual punishment."

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN13 **Courts of Criminal Appeals**

In reviewing a sentence for appropriateness under Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, an appellate court is not required to engage in sentence comparison with specific cases except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases. To be closely related, the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design. The burden is upon the appellant to make such a showing. If an appellant is able to do so, the Government must then establish a rational basis for the wide disparity.

Military & Veterans Law > Military Justice > Judicial Review > General Overview

HN14 Ordinarily, an appellate court will not review a complaint concerning post-trial confinement unless the appellant has shown that all means of administrative

relief have been exhausted.

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN15 **Cruel & Unusual Punishment**

Without question, a servicemember is entitled to protection against cruel and unusual punishment under Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855, as well as U.S. Const. amend. 8. The United States Court of Appeals for the Armed Forces has applied the United States Supreme Court's interpretation of the Eighth Amendment to claims raised under Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855, except in circumstances where that court has discerned a legislative intent to provide greater protections under the statute. Allegations involving cruel and unusual punishment under U.S. Const. amend. 8 and Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855, must be measured against contemporary standards of decency. The Eighth Amendment does not mandate comfortable prisons, but neither does it permit inhumane ones.

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN16 **Cruel & Unusual Punishment**

In order to find a violation of the Eighth Amendment, two requirements must be met: First, the deprivation alleged must be, objectively, "sufficiently serious"; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities. The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. In prison-condition cases, that state of mind is one of deliberate indifference to inmate health or safety.

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN17 **Confinement**

An appellant who asks a military court of criminal appeals to review prison conditions must establish a "clear record" of both the legal deficiency in administration of the prison and the jurisdictional basis for the action. Although the United States Court of Appeals for the Armed Forces in White has clearly announced that it has jurisdiction to review cases where inmates allege constitutional violations while incarcerated, it reaffirmed its holding in Coffey, which indicates that a prisoner must exhaust administrative remedies before invoking judicial intervention. However, in White, the court determined it need not remand the record to determine if administrative remedies have been exhausted where the appellant's assertions fail on their merits.

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HN18 **Confinement**

When reviewing denials of constitutional rights based upon prison regulations, the proper inquiry is whether the regulations are reasonably related to legitimate penological interest. The test is whether a U.S.

Disciplinary Barracks policy that restricts materials and conversation in a foreign language is reasonably related to a legitimate penological interest. In carrying out this analysis, the U.S. Supreme Court has provided a number of factors for consideration. These include: (1) whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact that accommodation of the asserted constitutional right would have on others in the prison (guards and inmates); and (4) whether there is an obvious alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests.

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LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel.

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LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel.

Maj DANNY R. FIELDS, USMC, Appellate Government Counsel.

Judges: BEFORE C.L. CARVER, W.L. RITTER, D.A. WAGNER. Senior Judge CARVER and Judge WAGNER concur.

Opinion by: W.L. RITTER

Opinion

RITTER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of 2 specifications of attempted robbery, 4 specifications of conspiracy to commit robbery, 2 specifications of wrongful distribution of marijuana, wrongful possession of marijuana with intent to distribute, 3 specifications of robbery, receiving stolen property, and transporting stolen property through interstate commerce, in violation of Articles 80, 81, 112a, **[*2]** 122, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 880*, *881*, *912a*, *922*, and *934*. The appellant was sentenced to confinement for 20 years, total forfeitures, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the assignments of error, the Government's response, the appellant's reply, and the various supplemental submissions. 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. [1] *See Arts. 59(a)* and *66(c)*, UCMJ.

[*3] In several pleadings submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, supported by a series of lengthy handwritten statements by both the appellant and other sentenced confinees, the appellant contends that he received ineffective assistance of counsel, illegal pretrial punishment, an unduly severe and disparate sentence, an unreasonable multiplication of charges, and cruel and unusual post-trial punishment.

Facts

The appellant conspired and attempted to rob the Marine Federal Credit Union office located in Jacksonville, North Carolina, and later, an armored car outside the same Navy Federal Credit Union office. Both attempts failed because the appellant and his co-conspirators, after approaching their targets with loaded weapons and other equipment, decided the circumstances were not optimal for success and left the scene.

The appellant and his co-conspirators committed three successful robberies. The appellant brandished a loaded handgun while robbing a convenience store aboard Marine Corps Base Camp Lejeune of approximately $ 5,000.00. In that instance, two co-conspirators waited outside as lookouts and drivers. The appellant, **[*4]** acting alone, also robbed an off-base convenience store through the use of a loaded handgun. On a third occasion, the appellant stole a

[1] We note that on page 45 of the record of trial that the appellant responded "yes, sir" to the military judge's question whether anyone forced or threatened the appellant to sign two stipulations of fact. Since the appellant's other responses establish that it was his desire to enter into the stipulations both for findings and for sentencing purposes, and that he agreed to both uses, we are convinced that the appellant simply misspoke with regard to the question about being forced or threatened to enter into the stipulations.

Lexus automobile, by forcing a 73-year-old woman out of the car at gunpoint, while two co-conspirators acted as lookouts nearby. The appellant also worked with two accomplices in transporting a stolen car over state lines, after which the appellant took sole custody of the car in an attempt to sell it.

When questioned by agents of the Naval Criminal Investigative Service (NCIS), the appellant provided a detailed confession of all these offenses. He also confessed to being heavily involved in the distribution of marijuana. NCIS agents searched the house where the appellant was temporarily residing and seized a pound of marijuana from the room used by the appellant. The appellant was put in pretrial confinement immediately following his confession.

According to the appellant's detailed statements, he was assigned a trial defense counsel a few weeks after being confined, prior to the referral of charges. In their first meeting, the trial defense counsel, Lieutenant (LT) E, explained that he had been given a preliminary briefing on the facts of the **[*5]** case by his officer-in-charge, and recommended that they seek a pretrial agreement as soon as possible. The appellant said he would agree to a pretrial agreement limiting confinement to 10 years, and would consider one for 15 years, but only after he had seen all of the evidence against him, and on condition that he was not required to testify against his co-conspirators.

After discussions with the Government, LT E returned and told the appellant that the trial counsel would endorse a pretrial agreement for 25 years confinement if the appellant would agree to testify against his co-actors. The appellant was adamantly against any deal on those terms. Soon afterwards, at LT E's advice, the appellant requested and was granted an individual military counsel, Captain (Capt) O. Both counsel discussed the evidence and issues with the appellant, and strongly advised the appellant not to delay in accepting a deal. They noted that the appellant's co-conspirators had stated their willingness to testify for the Government against their comrades as part of a favorable pretrial agreement, and that the Government would be less receptive to a deal as the case progressed.

The appellant's counsel **[*6]** initially waived the *Article 32*, UCMJ, investigation in this case in an effort to obtain a more favorable pretrial agreement, but did so without consulting the appellant. At the appellant's insistence, this waiver was revoked and an *Article 32* investigation was conducted. The appellant eventually became disenchanted with his two counsel because of their persistent efforts to get him to enter into a pretrial agreement at a time when he was more interested in contesting the charges and raising possible suppression motions. But, soon after his arraignment, the appellant heard that one of his co-conspirators, Staff Sergeant (SSgt) Garcia, had been sentenced to 125 years of confinement at his court-martial. Having also heard that the convening authority was no longer interested in a deal with the appellant, and being advised by SSgt Garcia to seek a pretrial agreement, the appellant changed his views and became desperate to get a pretrial agreement. He readily accepted a pretrial agreement suspending confinement over 50 years, a far less favorable deal than was originally offered.

Ineffective Assistance of Counsel

The appellant now contends he received ineffective assistance of **[*7]** counsel and was denied his right to counsel. He asserts his detailed and individual military counsel were ineffective because they failed to: (1) adequately investigate the case; (2) adequately prepare for the *Article 32*, UCMJ, hearing; (3) challenge the legality of his arrest, the voluntariness of his confession, and the legality of the search and seizure of evidence; (4) raise the issues of illegal pretrial punishment and unreasonable multiplication of charges; and (5) raise sentence disparity in post-trial submissions. [2] The appellant also asserts that he was denied the right to counsel, based on the military judge's refusal to release his detailed defense counsel and individual military counsel during a preliminary *Article 39(a)*, UCMJ, hearing. We find no merit in any of these contentions.

[*8] ***HN1***[↑] The *Sixth Amendment* guarantees an accused the right to assistance of counsel, which Congress codified for military personnel in *Article 27*, UCMJ. This right to effective assistance of counsel covers the pretrial, trial, and post-trial stages. *United States v. Hicks, 47 M.J. 90, 92 (C.A.A.F. 1997)*(citing *United States v. Carter, 40 M.J. 102, 105 (C.M.A. 1994)*; *United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994)*). However, this right to the assistance of counsel does not guarantee a "meaningful relationship" between an

[2] Additional allegations of ineffective assistance are suggested by the defense pleadings, but we find them to be either (1) logically included in the assertions addressed above, or (2) clearly contradicted by the appellant's own statements attached to the pleadings.

accused and his counsel. *Morris v. Slappy, 461 U.S. 1, 14, 75 L. Ed. 2d 610, 103 S. Ct. 1610 (1983)*. As a result, on claims of ineffective assistance of counsel, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic, 466 U.S. 648, 657 n.21, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)*.

In *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*, the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The court stated:

> ***HN2***[↑] A convicted defendant's claim that counsel's assistance was so defective **[*9]** as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. ***HN3***[↑] This standard is applicable to military cases. *United States v. Scott, 24 M.J. 186, 187 (C.M.A. 1987)*. Counsel are strongly presumed to be competent in the performance of their duties. *Cronic, 466 U.S. at 658*. "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001)*. Thus, in order to demonstrate ineffective **[*10]** assistance of counsel, an appellant "must surmount a very high hurdle." *United States v. Smith, 48 M.J. 136, 137 (C.A.A.F. 1998)*(quoting *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997)*).

HN4[↑] The Court of Appeals for the Armed Forces (CAAF) has set forth the following 3-part test for evaluating whether the strong presumption of competence has been overcome:

> (1) Are the appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . (ordinarily expected) of fallible lawyers?"; and
>
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56, M.J. 304, 307 (C.A.A.F. 2002)(quoting *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)*).

We find that the appellant has failed to meet his burden to overcome the presumption of competence of his counsel. In fact, after careful scrutiny of the appellant's voluminous pleadings, the only apparent **[*11]** error we note is that the appellant's counsel initially waived the *Article 32*, UCMJ, hearing without discussing it with the appellant, and with no apparent good cause for failing to obtain the appellant's consent. *See United States v. Garcia, 59 M.J. 447, 450-52 (C.A.A.F. 2004)*. However, this error was quickly remedied by withdrawing that waiver, and the *Article 32* investigation was conducted. This contention thus fails to satisfy the prejudice prong of *Strickland*, and serves as no basis for finding his counsel ineffective. *United States v. Adams, 59 M.J. 367, 370-71 (C.A.A.F. 2004)*. As to the appellant's other contentions, we find that his own statements undermine his claims of counsel deficiencies.

Taking the appellant's major contentions consecutively, his written statements attached to the pleadings demonstrate that his counsel adequately investigated the charges and issues. While ***HN5***[↑] a failure to investigate before advising an accused may constitute ineffective assistance where the accused provides counsel with specific names of exculpatory witnesses, *see United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000)*, this was not **[*12]** such a case. Rather, the appellant indicated a willingness to plead guilty from the start, and after frank discussions with his counsel regarding the strength of the Government's evidence, [3] he eventually chose to plead guilty in exchange for a pretrial agreement. The appellant also claims that his counsel were ill-prepared for the *Article 32* investigation.

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[3] The appellant's statements in this regard establish that his counsel discussed the evidence with him, and that the appellant was fully aware of the legal requirement for corroboration of a confession. *See* Attachment C to Brief and Assignment of Error dated 13 Nov 2000 at 7. This undermines one of the appellant's logically-included claims; i.e., that his counsel never advised him of the corroboration requirement.

But he makes no specific assertion of deficiencies, and we find none. HN6[] Broad assertions of inadequate investigation and preparation, by themselves, do not meet the appellant's burden to establish deficient performance. *See* United States v. Moulton, 47 M.J. 227, 229-30 (C.A.A.F. 1997).

[*13] Regarding his counsel's failure to bring suppression motions, the appellant admits that, although he was initially reluctant to plead guilty because he was not offered sufficiently lenient terms for a pretrial agreement, he later changed his mind after a co-conspirator was sentenced to confinement for 125 years. The appellant's statements also make clear that he understood the convening authority would not enter into a pretrial agreement unless the appellant waived any suppression motions [4], and that he willingly chose to plead guilty in exchange for such an agreement after his co-conspirator advised him to seek one. Attachment C to Brief and Assignment of Error dated 13 Nov 2000 at 24-25. Moreover, we find no showing from the appellant's pleadings or statements to suggest a reasonable probability that a motion to suppress either his confession or the evidence seized at the house where he was staying would have been meritorious. *See* United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001); United States v. Napoleon, 46 M.J. 279, 284 (C.A.A.F. 1997).

[*14] Finally, the appellant concedes that his counsel discussed with him the issues of pretrial punishment and sentence disparity, and admits they made tactical decisions not to raise them at trial and before the convening authority, respectively, because they viewed them as unfounded. Attachment C to Brief and Assignment of Error dated 13 Nov 2000 at 26-27; Attachment D to Brief and Assignment of Error dated 13 Nov 2000 at 7-8. Like our superior court, HN8[] we will not second-guess the strategic or tactical decisions of defense counsel. *See* United States v. Curtis, 44 M.J. 106, 119 (C.A.A.F. 1996); Morgan, 37 M.J. 407, 410 (C.M.A. 1993). Furthermore, these issues are discussed separately, and along with the appellant's contention that the charges were unreasonably multiplied, we find no merit in them. Thus, we can find no deficiency in his counsel for their decisions not to raise these three issues.

Viewing as a whole the appellant's statements concerning his counsel's alleged deficiencies, it appears the crux of the appellant's dissatisfaction with his counsel is his belief that they were too quick to recommend a pretrial agreement, and then failed to negotiate **[*15]** a sufficiently favorable pretrial agreement. Yet, as previously noted, the appellant admits he expressed a desire for a pretrial agreement in his first meeting with counsel, albeit on specified terms, and that it was his own reluctance to accept their advice that eventually led to a pretrial agreement on far less favorable terms. In view of the seriousness of the charges, the appellant's lengthy and detailed confession, and the appellant's statements indicating at least some of his co-conspirators were cooperating with the Government, we find no deficiency in the appellant's counsels' strategy to seek speedy negotiations towards a pretrial agreement.

We also find no prejudice to the appellant as a result of this strategy. The Government's evidence was strong, both because of the appellant's detailed confession and the fact that the Government had sufficient corroboration evidence to convince both the appellant and his attorneys that the Government could prove the case. Moreover, by the time of the appellant's court-martial, at least one conspirator had already been tried, and admitted in sworn testimony to the details of many of the same offenses for which the appellant had been **[*16]** charged. Garcia, 59 M.J. at 450, 452. By the time the appellant was willing to accept a pretrial agreement offer, the convening authority would only agree to suspend confinement over 50 years. Nevertheless, the appellant's counsel presented an effective sentencing case that resulted in the military judge adjudging only 20 years confinement -- less than half the punishment that the appellant himself bargained for in pleading guilty, and less than the convening authority's original pretrial agreement offer. Under these circumstances, applying the Court of Appeals' three-prong test, we find that the appellant has not overcome the strong presumption of competence in his counsel.

Denial of Right to Counsel

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[4] The actual pretrial agreement does not include a provision waiving possible motions. We infer from the appellant's statements that the convening authority would not agree to a conditional plea of guilty. HN7[] Unconditional guilty pleas waive all suppression issues pursuant to MILITARY RULES OF EVIDENCE 304(d)(5) and 311(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). However it was explained to him, the appellant understood that by pleading guilty, he was agreeing to waive any Fourth Amendment issues.

The appellant also asserts that he was denied the right to counsel, but this contention is based solely on the military judge's refusal to immediately release his detailed defense counsel and individual military counsel during the second preliminary *Article 39(a)*, UCMJ, session in this case. Far from denying the appellant his right to counsel, the military judge's decision not to release his counsel "at this point in time" rather prevented him from being temporarily **[*17]** without counsel. Record at 19-20. This inured to the appellant's benefit, since the appellant had expressed a desire for a new attorney on the record, but had yet to either officially request or retain other representation.

Moreover, the appellant waived any error on this basis. At the very next *Article 39(a)*, UCMJ, session, the appellant told the military judge that he had changed his mind, that he was satisfied with both his detailed defense counsel and individual military counsel, and that he desired to continue being represented by them. In view of the appellant's unqualified retraction of his request to release his counsel and seek new representation, we find no merit in the contention that the military judge denied the appellant his right to counsel.

Pretrial Punishment

The appellant contends that he suffered pretrial punishment as a result of being placed in pretrial confinement in "special quarters" (maximum security) at the Camp Lejeune Base Brig. He claims that his placement in special quarters was unwarranted, because the decision was based on the potential punishment he could receive at court-martial, and because the decision disregarded his previous exemplary brig **[*18]** time. He also contends that the conditions were unduly harsh [5]. He therefore requests 15 days of additional credit for every day served in pretrial confinement. We find no pretrial punishment, and decline to grant relief on this basis.

Although the appellant did not raise this issue at trial, the issue is not waived, since the confinement occurred prior to our superior court's decision in *United States v. Inong, 58 M.J. 460 (C.A.A.F. 2003)*.

HN9[↑] Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003)*, *rev. denied, 59 M.J. 32 (C.A.A.F. 2003)*. The burden of proof is on the appellant to show a violation of *Article 13*, UCMJ. *See United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002)*. "*Article 13*, (UCMJ) prohibits **[*19]** two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial; i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement." *Inong, 58 M.J. at 463* (citing *United States v. Fricke, 53 M.J. 149, 154 (C.A.A.F. 2000))*.

HN10[↑] The "punishment prong" of *Article 13*, UCMJ, focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor, 57 M.J. at 825* (citing *United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)*. Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. *McCarthy, 47 M.J. at 167-68*. When an arbitrary brig policy results in particularly egregious conditions of confinement, the court may infer that an accused has been subject to pretrial punishment. *See United States v. Anderson, 49 M.J. 575, 577 (N.M.Ct.Crim.App. 1998)*. However, **[*20]** if the conditions of pretrial restraint were reasonably related to a legitimate government objective, an appellant will not be entitled to relief. *See McCarthy, 47 M.J. at 167*; *see also United States v. Sittingbear, 54 M.J. 737, 741 (N.M.Ct.Crim.App. 2001)*.

The policies and procedures of the Camp Lejeune Base Brig have undergone considerable scrutiny in recent years. *See, e.g., Mosby, 56 M.J. at 310*; *United States v. Kinzer, 56 M.J. 741, 742 (N.M.Ct.Crim.App. 2002)*, *aff'd*, *58 M.J. 287 (C.A.A.F. 2003)*. In *Kinzer*, this court granted relief due to the "arbitrary policy" of keeping all prisoners facing greater than seven years of confinement in special quarters. However, in *Kinzer* this issue was litigated thoroughly at trial. *Kinzer, 56 M.J. at 742 n.1*. Here, the appellant raises this issue for the first time on appeal. The appellant's failure to complain about the conditions of his pretrial confinement until now is "strong evidence" that *Article 13*, UCMJ, was not violated. *See United States v. Huffman, 40 M.J. 225, 227 (C.M.A. 1994))*.

The appellant's contention **[*21]** that he should not have been assigned to special quarters because of the potential confinement he was facing at trial is not well-

[5] The appellant's Motions to Attach Documents of 26 November 2002 and 2 December 2002 are granted.

taken. The appellant was accused of a series of robberies and attempted robberies with a deadly weapon, as well as serious drug charges. ***HN11***[↑] The placement of a detainee in solitary confinement simply because of the seriousness of his offense does not violate *Article 13*, UCMJ, in the absence of any evidence showing an intent to punish. *See Mosby, 56 M.J. at 310-11*. Moreover, the nature and seriousness of the offenses and the corresponding length of potential confinement are relevant factors that brig officials may consider in determining whether to place a detainee in special quarters. *Anderson, 49 M.J. at 577*.

The appellant contends that his previous uneventful time in the brig while serving a sentence from an earlier court-martial should have weighed in favor of a lower security classification while awaiting court-martial on the charges at bar. But the previous court-martial was for unauthorized absence only, and resulted in 120 days confinement and a suspended bad-conduct discharge. The appellant committed the current offenses **[*22]** after he was released from confinement. Thus, the pretrial confinement in this case followed what can reasonably be termed an unsuccessful attempt at rehabilitation, and was based on far more serious and dangerous crimes against society.

We have also considered the appellant's contentions regarding the conditions of his pretrial confinement in "special quarters," and find that he has not met his burden under *Article 13*, UCMJ. [6] Although austere, the conditions of "special quarters," as outlined by the appellant in his extensive submissions, indicate that he was not deprived of basic needs. He received enough food such that he put himself on a diet, and had showers, visits, phone calls, and mail. When the confinees complained that the cells were too cold, a third wool blanket was issued to each prisoner, and they were allowed to wear field jackets, even though wearing the jackets was apparently against standard operating procedures. The appellant does not contend that he was denied medical treatment, or that he was subjected to the use of excessive force. *See generally, United States v. Avila, 53 M.J. 99 (C.A.A.F. 2000)*. Given the circumstances of this case, as outlined **[*23]** by the appellant, we find that, under the totality of the circumstances, the conditions were reasonably imposed pursuant to legitimate governmental interests.

The appellant has not demonstrated an intent to punish, and we find that the violent and serious nature of the charges against him justified the decision to keep him in special quarters pending trial. We are confident that the conditions of pretrial **[*24]** restraint were reasonably related to a legitimate government objective. The appellant has not met his burden, and we decline to grant sentence relief.

Sentence Severity and Disparity

The appellant contends that his sentence was inappropriately severe and disparate to that of one of his co-conspirators. We disagree. We will first address the issue of sentence disparity.

HN13[↑] In reviewing a sentence for appropriateness under *Article 66*, UCMJ, we are not required to engage in sentence comparison with specific cases "'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)*(quoting *United states v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985))*. To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly, 40 M.J. 558, 570 (N.M.C.M.R. 1994)*. The burden is upon the appellant to make such a showing. *Lacy, 50 M.J. at 288*. If an appellant is able to **[*25]** do so, the Government must then establish a rational basis for the wide disparity. *Id*.

The appellant cites only the case of co-conspirator Lance Corporal (LCpl) Espinal to support his claim that his sentence is highly disparate. He indicates that LCpl Espinal was adjudged only 10 years confinement, and the same convening authority agreed to suspend any confinement greater than 42 months in that case. LCpl Espinal was convicted of the attempt and conspiracy to rob the armored car, the conspiracy to rob the car that was later taken to New York City with the appellant, the larceny of the car, and wrongful transportation of that stolen car in interstate commerce. Attachment F to Brief and Assignment of Error dated 13 Nov 2000 at 1-2. But

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[6] While the appellant, in his Reply Brief of 18 Nov 2002, argues his pretrial confinement was "cruel and unusual punishment" in violation of *Art. 55*, UCMJ, and the *Eighth Amendment to the United States Constitution*, ***HN12***[↑] the plain language of both of these provisions refers to adjudged punishment rather than pretrial confinement. Pretrial confinement is not "punishment" unless it is unlawfully administered. Thus, the appellant's failure to meet his burden under *Article 13*, UCMJ, to show pretrial punishment also resolves the question whether the conditions of his confinement amounted to "cruel and unusual punishment."

we note from the appellant's stipulation of fact that LCpl Espinal was not involved in (1) the armed robberies of the two convenience stores, (2) the attempted robbery of the Marine Federal Credit Union, (3) the robbery of the Lexus automobile from its driver, or (4) any of the appellant's serious drug offenses. We therefore find that LCpl Espinal's case is not closely related to the appellant's. *See* United States v. Wacha 55 M.J. 266, 268 (C.A.A.F. 2001) **[*26]** (noting drug dealer's case not closely related to buyer's case, since latter was only involved in 4 of the former's 16 drug offenses).

The appellant's brief also fails to reference the sentences in the cases of two other co-conspirators, SSgt Garcia and Sergeant (Sgt) Gutierrez. SSgt Garcia was convicted of offenses similar to the appellant's, with some deviations, and was sentenced, in part, to confinement for 125 years. Sgt Gutierrez received the same amount of confinement as the appellant (20 years), and yet he was not involved in many of the appellant's offenses: specifically, (1) the attempted robbery of the Marine Federal Credit Union, (2) the armed robberies of the off-base convenience store and the Lexus, (3) the transportation and receipt of a stolen car, or (4) any of the appellant's serious drug offenses.

Even if we were to find that LCpl Espinal's case was closely related to the appellant's, we do not find the sentences to be highly disparate. As shown above, the appellant's offenses dwarf those of LCpl Espinal in number and severity. LCpl Espinal participated in only one of four violent crimes the appellant engaged in using a deadly weapon. Furthermore, LCpl Espinal's **[*27]** role in the attempted robbery of the armored car was to act as the get-away driver, while the appellant agreed to assist in confronting the armored car's security personnel. *See* Prosecution Exhibit 10. For these reasons, we do not find the appellant's sentence to be highly disparate. Even if it were otherwise, there are good and cogent reasons for the disparity.

Regarding the appellant's contention that his sentence is unduly severe, we find no merit in it. We have fully considered the appellant's difficult childhood, which included his father's suicide and an accident resulting in head trauma. However, the appellant committed a string of serious violent crimes. He committed these offenses while on appellate leave after a conviction at special court-martial. The convening authority suspended the punitive discharge, but later vacated it when the appellant committed a period of unauthorized absence. Finally, the sentence was far less than the appellant himself bargained for in pleading guilty. We find the sentence to be extremely appropriate, based on the character of the appellant and the nature and seriousness of his offenses. *See* United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982). **[*28]**

Unreasonable Multiplication of Charges

The appellant contends that the Specifications under Charge V, involving receiving and transporting a stolen car, represent an unreasonable multiplication of the charges. We disagree.

With two co-conspirators, the appellant drove a car he knew had been stolen by another co-conspirator from North Carolina to New York City. In so doing he violated 18 U.S.C. § 2312, punishable under clause three of Article 134, UCMJ. After his co-conspirators were unable to sell the vehicle, they left the vehicle in his possession. The appellant made subsequent unsuccessful attempts to sell the vehicle, and finally abandoned it, pawning only the tires and rims.

The appellant contends that the two separate offenses arise from a single transaction, in that he received the car when he started driving it, and thus the receiving and transporting offenses were simultaneously committed. But this contention contradicts the sworn statements he made during the providence inquiry and in the stipulation of fact that he entered into. Record at 92-93; Prosecution Exhibit 9. As the Government contends, the receipt of stolen property conviction **[*29]** is based on the appellant's receiving sole possession of the vehicle from his co-conspirators while in New York City, after they failed to find a buyer and returned to North Carolina.

The receipt and transportation charges refer to different events involving different times and locations. We find that the two charges did not exaggerate the appellant's criminality or unreasonably increase his punitive exposure, and find no evidence of prosecutorial overreaching or abuse in drafting the charges. This assignment of error is without merit. *See* United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2002).

Cruel and Unusual Punishment

In a supplemental assignment of error, the appellant contends he was subjected to cruel and unusual punishment after he had been convicted, that he was

denied due process of law by his confinement custody classification, and that his First Amendment rights were violated by the United States Disciplinary Barracks (USDB) policy on foreign language communications. [7] As relief, he asks this court to set aside the sentence, issue administrative credit, or grant such other relief as may be fair and just. Upon review of the appellant's post-trial **[*30]** submissions, we find that he has failed to demonstrate that he was subjected to cruel and unusual punishment or is otherwise entitled to relief.

Post-Trial Conditions of Confinement

In his post-trial submissions, the appellant describes the conditions of his post-conviction confinement at first, the brig at Camp Lejuene, and later, the USDB. We have already considered the conditions at Camp Lejeune, and found them not to constitute pretrial punishment. We note, also, that the conditions there improved somewhat during the appellant's post-trial confinement period. Finding no cruel and unusual punishment during the appellant's confinement at Camp Lejeune, **[*31]** we will turn next to the appellant's contentions regarding the conditions at the USDB. Among his complaints are the lack of outdoor exercise for persons in his custody classification, the lack of interaction with others, the painful and excessive use of restraints when being moved out of the cell, and the size of the cell.

HN14[] Ordinarily, we would not review a complaint concerning post-trial confinement unless the appellant has shown that all means of administrative relief have been exhausted. *United States v. Miller, 46 M.J. 248 (C.A.A.F. 1997)*(holding that an appellant must show exhaustion of remedies or unusual circumstances exist justifying failure to pursue or exhaust); *United States v. Coffey, 38 M.J. 290 (C.M.A. 1993)*. In the case before us, the appellant has presented matters that appear to have begun the process of utilizing administrative avenues for redress. Appellant's Motion to Attach of 2 Dec 2002; Attachments 1 and 5 of Appellant's Supplemental Brief of 6 Aug 2002. For the purpose of this issue, we will assume that he has exhausted such means of redress, rather than dismissing the assignment of error on procedural or jurisdictional grounds.

[*32] We have reviewed the appellant's extensive submissions and find they do not demonstrate that he was subjected to cruel and unusual punishment. *See Avila, 53 M.J. at 101 n.1*. ***HN15***[] Without question, a service member is entitled to protection against cruel and unusual punishment under *Article 55*, UCMJ, as well as the *Eighth Amendment to the United States Constitution*. *Avila, 53 M.J. at 101* (citing *United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983)* and *Art. 55*, UCMJ). The CAAF has applied the United States Supreme Court's interpretation of the *Eighth Amendment* to claims raised under *Article 55*, UCMJ, except in circumstances where that court has discerned a legislative intent to provide greater protections under the statute. *United States v. White, 54 M.J. 469, 473 (C.A.A.F. 2001)*; *Avila, 53 M.J. at 101* (citing *United States v. Wappler, 2 C.M.A. 393, 9 C.M.R. 23, 26 (C.M.A. 1953))*. Allegations involving cruel and unusual punishment under the *Eighth Amendment* and *Article 55*, UCMJ, must be measured against contemporary standards of decency. *United States v. Martinez, 19 M.J. 744, 748 (A.C.M.R. 1984).* **[*33]** "The *Eighth Amendment* 'does not mandate comfortable prisons,' but 'neither does it permit inhumane ones.'" *White, 54 M.J. at 474* (quoting *Farmer v. Brennan, 511 U.S. 825, 832, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994)*). ***HN16***[] In order to find a violation of the *Eighth Amendment*, two requirements must be met:

> "First, the deprivation alleged must be, objectively, 'sufficiently serious'; a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.' . . . The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the *Eighth Amendment*.' To violate the *Cruel and Unusual Punishments Clause*, a prison official must have a 'sufficiently culpable state of mind.' In prison-condition cases, that state of mind is one of 'deliberate indifference' to inmate health or safety[.]"

Avila, 53 M.J. at 101 (quoting *Farmer, 511 U.S at 834*); *accord White, 54 M.J. at 474*.

Even if we were to assume that the appellant's conditions of confinement were austere and his privileges were curtailed in a manner more restrictive than others, **[*34]** as he alleges, the appellant was not deprived of basic human needs. The attachments indicate that the appellant received food and basic

[7] The appellant's 6 August 2002 Motion to Supplement his brief is granted. The appellant's Motion to Attach supporting documents is granted with respect to attachments 1-16, 18-25, and 29-32. The motion is denied with respect to attachments 17 and 26-28 for lack of relevance to this case. The appellant's Motion to Attach of 6 September 2002 is also granted.

hygiene needs, had limited opportunities to get exercise, was allowed to have phone calls, was allowed to send and receive mail, and was allowed to have visitors. Thus, under prevailing case law, the conditions of his confinement did not result in a serious deprivation of necessities. Furthermore, many of the specific conditions that the appellant complains of -- notably, the lack of outdoor exercise, the lack of interaction with others, the "excessive" use of restraints when being moved out of the cell, and the size of the cell -- are apparently due to his custody classification status. As shown by the appellant's submissions, this status is based on a series of points that are assessed based on patently valid penological interests, and which do not jeopardize the appellant's health and safety.

But even if we were to assume a sufficiently serious deprivation of necessities, there is nothing presented that indicates a deliberate indifference by the USDB officials. Applying the guidance of *White* and *Avila*, upon review of the materials the appellant **[*35]** has provided, we find that he fails to establish a violation of either the *Eighth Amendment* or *Art. 55*, UCMJ. Accordingly, we do not find that the appellant suffered cruel and unusual punishment.

Due Process Violation

The appellant next argues a violation of due process in that he was assigned his custody classification status without the benefit of a review board and that the USDB failed to hold periodic reviews of his custody status. The crux of the appellant's claim is that the USDB regulations direct monthly reviews of an inmate's status. According to the appellant's submissions, his initial custody classification was on 16 April 1999. In the following 31 months, he had 17 custody review proceedings. See Motion to Attach of 6 Aug 2002, Attachment 13. Most recently, the appellant was advised that no favorable custody recommendations would be made until he was free of disciplinary infractions for 1 year. *Id*. at Attachment 16. In addition, the appellant has provided the court with guidance on the point-driven, custody classification system. *Id*. at Attachment 14.

We specifically note that from initial classification until 25 October 2001, the appellant's points **[*36]** increased, due to the disciplinary factor, a fact that appears to indicate repeated disciplinary infractions. *Id*. at Attachment 13. Lastly, we do not think the frequency of USDB custody classification reviews, though it may fall short of the regulations requiring a monthly review, are a dramatic departure from the basic conditions imposed by the sentence or outside the expected parameters of the conditions of the appellant's confinement. *See Sandin v. Conner, 515 U.S. 472, 484-86, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995)*. Accordingly, we find no due process violation on this basis.

First Amendment Violation

Lastly, the appellant claims that his *First Amendment* rights have been violated because he is not allowed to read, write, and converse in the Spanish language. We note, however, that he was allowed to receive and write mail in Spanish to his mother, brother, and grandfather. Motion to Attach of 6 Aug 2002 at Attachment 5. [8]

After inquiring **[*37]** into the reasons why he could not receive publications or certain letters in Spanish, the USDB judge advocate replied, indicating that:

> The primary purpose for the English-only policy established by the USDB is to further legitimate institutional security reasons and to retain the ability to monitor inmate correspondence. One of the primary purposes of this policy is to prevent inmates from continuing illegal and clandestine activities while incarcerated and to allow the USDB to monitor correspondence.

Id. at Attachment 7.

HN17[↑] "An appellant who asks this Court to review prison conditions must establish a 'clear record' of both 'the legal deficiency in administration of the prison and the jurisdictional basis for the action.'" *White, 54 M.J. at 472* (quoting *Miller, 46 M.J. at 250*). Although our superior court clearly announced that it had jurisdiction to review cases where inmates alleged constitutional violations while incarcerated, the court reaffirmed its holding in *Coffey*, which indicated that a prisoner must exhaust administrative remedies before invoking judicial intervention. *White, 54 M.J. at 472*. However, in **[*38]** *White*, the court determined it need not remand the record to determine if administrative remedies have been exhausted where the appellant's assertions fail on their merits. *Id. at 473*. We shall do likewise.

HN18[↑] When reviewing denials of constitutional rights based upon prison regulations, "the proper inquiry . . . is whether the regulations are 'reasonably related to

[8] However, he was not allowed this privilege with regard to his girlfriend.

legitimate penological interest.'" *Thornburgh v. Abbott, 490 U.S. 401, 404, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*(quoting *Turner v. Safley, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*). Although the appellant indicates that the U.S. Supreme Court case law requires a least restrictive means be employed to support a legitimate governmental interest, that reading of *Procunier v. Martinez, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)* was rejected by *Thornburgh. 490 U.S. at 411-12*. *Thornburgh* indicated that *Martinez* required no more than that a challenged regulation be generally necessary to a legitimate governmental interest, and in *Martinez*, the regulation was found to be aimed at curbing actions that were not serious threats to prison order. *Thornburgh, 490 U.S. at 411*. Thus, the test **[*39]** is whether a USDB policy that restricts materials and conversation in a foreign language is reasonably related to a legitimate penological interest.

In carrying out this analysis, the Supreme Court provided in *Turner* and *Thornburgh* a number of factors for consideration. These include:

> (1) Whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective;
> (2) Whether there are alternative means of exercising the right that remain open to prison inmates;
> (3) The impact that accommodation of the asserted constitutional right would have on others in the prison (guards and inmates); and
>
> (4) Whether there is an obvious alternative that fully accommodates the prisoner's rights at *de minimus* cost to valid penological interests.

Thornburgh, 490 U.S. at 414-18.

We first note that the governmental interests are legitimate and neutral. We also note that there are alternative means provided for exercising the right to speak and correspond in Spanish. First, the appellant is allowed to write and receive mail in Spanish with certain pre-approved persons. **[*40]** Second, the restriction on oral use of Spanish at the USDB still allows the appellant the freedom of speech, since the appellant speaks English and thus only the form and not the content has been restricted. Third, it is foreseeable that allowing an accommodation in this instance could endanger the safety and security at the USDB, as it could greatly complicate the task of monitoring and supervising inmate interactions. Although the appellant asserts that there are Spanish-speaking members on the USDB staff, accommodations of this sort would require the assignment of linguists to accommodate all languages known and used by inmates incarcerated there. In addition, the use of these personnel as foreign language content screeners would have more than a *de minimus* impact on the USDB's primary mission. Arguably, all guards would have to be able to speak Spanish in order to effectively monitor prisoner interaction. Further, the time and personnel required to screen foreign language material of all languages spoken by the inmates would decrease the amount of time and personnel available to focus on monitoring and keeping abreast of the day-to-day interaction among the inmate population.

[*41] The appellant has not offered an obvious alternative to the USDB regulations that would fully accommodate his rights at a *de minimus* cost to valid penological interests, nor do we see one. The appellant is free to speak and to receive materials in English, and accommodation has already been made by the USDB to allow the appellant to write and receive mail in Spanish from his closest relatives. Under *Turner*, it is sufficient that other means of expression remain available, and applying the Supreme Court's factors, we find that the challenged regulation is generally necessary to a legitimate governmental interest. We therefore find no merit in the appellant's contention that his *First Amendment* rights have been violated.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge CARVER and Judge WAGNER concur.

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United States v. Green

United States Air Force Court of Criminal Appeals

October 12, 2007, Decided

ACM 36664

Reporter
2007 CCA LEXIS 475 *; 2007 WL 4260482

UNITED STATES v. Senior Airman JASON O. GREEN, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.
NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Green, 2008 CAAF LEXIS 309 (C.A.A.F., Mar. 11, 2008)*

Prior History: [*1] Sentence adjudged 1 December 2005 by GCM convened at Kadena Air Base, Japan. Military Judge: Eric L. Dillow (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Core Terms

prison, sexual, sex offender, post-trial, convicted, inmates, regulation

Case Summary

Procedural Posture

Appellant servicemember challenged his conviction of possession, receipt, and display of visual depictions of a minor engaging in sexually explicit conduct in violation of Unif. Code Mil. Justice art. 134, *10 U.S.C.S. § 934*.

Overview

The servicemember claimed that he was subjected to cruel and unusual punishment in violation of the *Eighth Amendment* and Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*. He also alleged violations of the *First* and *Fifth Amendments*. These contentions were based on one of the rules of the brig in which the servicemember was incarcerated, specifically, the rule that prohibited convicted sex offenders from corresponding or visiting with any minor (under 18 years old) without permission from the commanding officer. The alleged deprivation was not of the caliber that triggered *Eighth Amendment* protection, i.e., it did not involve medical attention, proper food, or sanitary living conditions. The restriction did not involve all visitation or outside contact, just a certain segment of it, and the rule did not involve the entire prison population but was limited to convicted sex offenders involving a minor. Further, the commanding officer did not arbitrarily select the servicemember and deny him contact with minors. Finally, the servicemember failed to exhaust his remedies through the brig's grievance system.

Outcome
The military court of criminal appeals affirmed the findings and the sentence.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN1[] **Cruel & Unusual Punishment**

A military court of criminal appeals reviews allegations of *Eighth Amendment* violations and Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*, violations de novo. Unless certain conditions are met, the review for both provisions is identical. The *Eighth Amendment* prohibits punishments which are incompatible with the evolving

standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Civil Rights Law > ... > Procedural Matters > Federal Versus State Law > Exhaustion Doctrine

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN2 **Cruel & Unusual Punishment**

To prove an *Eighth Amendment* violation, an appellant must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that he has exhausted the prisoner grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, *10 U.S.C.S. § 938*.

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN3 **Cruel & Unusual Punishment**

Typically, to prove an *Eighth Amendment* violation required the denial of such things as needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify.

Civil Rights Law > Protection of Rights > Prisoner Rights > Freedom of Speech

HN4 **Freedom of Speech**

The constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the *First Amendment* context, for instance, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological objectives of the corrections system. Moreover, because the problems of prisons in America are complex and intractable, and because courts are "particularly ill" equipped to deal with these problems, courts generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Civil Rights Law > Protection of Rights > Prisoner Rights > Confinement Conditions

HN5 **Confinement Conditions**

The basic test for determining whether a restrictive prison rule withstands a constitutional challenge requires asking whether the challenged rule was reasonably related to a legitimate penological interest. To make this determination, four considerations are examined: (1) whether the regulation has a "valid, rational connection" to a legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and (4) whether there are "ready alternatives" to the regulation.

Counsel: For Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Dana G. Orndorff, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

For the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Jamie L. Mendelson.

Judges: Before FRANCIS, SOYBEL, and BRAND, Appellate Military Judges.

Opinion by: SOYBEL

Opinion

OPINION OF THE COURT

SOYBEL, Judge

The appellant pled guilty to one charge and specification of possession, receipt and display of visual depictions of a minor engaging in sexually explicit conduct in violation of Article 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. 934*.

The appellant initially asserted two issues. He claimed the convening authority took action in his case before viewing clemency matters. The appellant also claimed he was subjected to cruel and unusual punishment in violation of the *Eighth Amendment to the United States Constitution* and Article 55, UCMJ, *10 U.S.C. § 855*. [1] In a supplemental **[*2]** filing, without alleging additional facts, the appellant expanded the second issue to allege violations of the *First* and *Fifth amendments*. None of his issues have merit.

Post-Trial Processing Errors

The issue regarding post-trial processing was cleared up with an undisputed affidavit submitted by the government. A lack of attention to detail resulted in improper dates on some of the documents that made it appear the post-trial processing was improperly conducted. We are satisfied that the convening authority did review the appellant's clemency submissions under Rule for Courts-Martial 1106 before taking action in this case.

Background Concerning Allegation of Illegal Post-Trial Punishment

According to post-trial submissions, the Naval Consolidated Brig, Miramar was designated as the facility where the appellant would serve out his sentence. One of the rules of that facility prohibits convicted sex offenders from corresponding or visiting with any minor (under 18 years old) without permission from the "Commanding Officer" (CO). The appellant qualified as a sex offender under the rules.

Prisoners could seek permission **[*3]** for an exception to the rule, and had to include a written recommendation from a "child abuse specialist" recommending such contact. The appellant submitted his request for permission to contact his 17-year-old sister along with a letter from a "licensed professional counselor" who had specialized for "several years" "working with children who have experienced trauma." The counselor recommended approval of the appellant's request because it would be a "positive experience" for the appellant's sister. The CO denied the appellant's request. The appellant's claims focus solely on his inability to communicate with his sister.

Eighth Amendment and Article 55, UCMJ

HN1[↑] We review allegations of *Eighth Amendment* violations and *Article 55, UCMJ* violations de novo. *United States v. Pena, 64 M.J. 259, 265 (C.A.A.F. 2007)*. Unless certain conditions, which are not present in this case, are met, the review for both provisions is identical. *Id.* "[T]he *Eighth Amendment* prohibits punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wonton infliction of pain." *United States v. White, 54 M.J. 469, 474 (C.A.A.F 2001)* **[*4]** (citing *Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)* (internal citations omitted)); *Pena, 64 M.J. at 265*; *United States v. Lovett, 63 M.J. 211 (C.A.A.F. 2006)*.

HN2[↑] To prove an *Eighth Amendment* violation, the appellant must show "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he 'has exhausted the prisoner grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, *10 U.S.C. § 938* . . . .'" *Lovett, 63 M.J. at 215* (footnotes omitted).

The appellant's claim fails for several reasons. First, his complaint does not amount to a serious act or omission resulting in a denial of necessities. ***HN3***[↑] Typically, these are things such as denial of needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify. *See United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000)*. The appellant's deprivation is not of the caliber that triggers *Eighth Amendment* protection. It is more akin to routine conditions associated with punitive or administrative segregation **[*5]** such as restriction of contact with other prisoners, of exercise outside a cell, of visitation privileges, of telephone privileges, and/or of reading material. *Id. at 102*. We also note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. This partial, rather than full, restriction on the appellant's ability to communicate with friends and family also supports the government's case. *See Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)*; *Henderson v. Terhune, 379 F.3d 709 (9th Cir. 2004)*.

[1] Submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

Second, the appellant has not shown the Commanding Officer acted with a culpable state of mind. The commander did not arbitrarily select the appellant and deny him contact with minors. He was acting pursuant to, and enforcing, the Brig rules. An administrative letter from the Brig explaining the purpose of the rule, submitted by the appellant, shows it is clearly designed to protect child victims and is applicable to all sex offenders. This rule has a legitimate purpose of protecting society. By enforcing this existing rule, the Commanding Officer did not display the requisite "deliberate indifference to [the appellant's] health and safety." *Lovett, 63 M.J. at 215* **[*6]** (citations omitted).

Finally, although he used the Brig grievance system, the appellant did not file a petition for relief under *Article 138, UCMJ*. Filing an Article 138 petition is required as part of the appellant's obligation to exhaust his administrative remedies prior to seeking redress in this Court for illegal post-trial confinement. *United States v. Wise, 64 M.J. 468 (C.A.A.F. 2007)*.

First and Fifth Amendment Claims

The appellant relies primarily on *Overton v. Brazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003)*, to support the notion that prison officials may not completely exclude prisoners from having contact with minor children. In that case, the justification for upholding the prison's rule that prohibited visitation with minor nieces and nephews and children to whom parental rights have been terminated was the fact that the prisoners had an alternative means for staying in contact with those family members, namely through letters and phone calls. *Id. at 135*. Here the appellant notes he is subject to a total ban on contact with minor children unless he first receives permission from the Commanding officer of the Brig. We find appellant's claim to be without merit.

The Supreme Court has held in *Shaw v. Murphy, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001)*,

> ***HN4***[↑] [T]he **[*7]** constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the *First Amendment* context, for instance, some rights are simply inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system." We have thus sustained proscriptions of media interviews with individual inmates, prohibitions on the activities of a prisoners' labor union, and restrictions on inmate-to-inmate written correspondence. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are "particularly ill" equipped to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Id. at 229 (internal citations omitted). ***HN5***[↑] The basic test for determining whether a restrictive prison rule withstands a constitutional challenge was first stated in *Turner, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64*, which asked whether the challenged rule was reasonably related to a legitimate penological interest. To make this determination, *Turner* acknowledged four considerations:

> [W]hether the regulation **[*8]** has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.

Overton, 539 U.S. at 132 (citing *Turner, 482 U.S. at 89-91*). [2]

Since *Turner*, the test has undergone some refinement depending on the situation to which it was applied. For example, in *Beard v. Banks, 548 U.S. 521, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006)*, the court recognized that not all four factors are equally useful nor need be applied with equal value, depending on the circumstances of the case and the regulation that is challenged. In *Beard*, when reviewing a *First Amendment* challenge to a rule that deprived a small class of prisoners of most reading material as a means of punishing them for bad behavior, **[*9]** the Court found that the second, third, and fourth factors added little to the analysis because they were logically related to the policy itself and the first factor was shown to be not only logically related to the regulation but was reasonably related. *Id. at 2580*.

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[2] *Turner* has been superceded by the Religious Freedom Restoration Act of 1993 (RFRA), *42 U.S.C. §§ 2000bb-1 et seq*, but only with respect to free exercise of religion. *Show v. Patterson, 955 F. Supp. 182 (D.N.Y. 1997)*; *Estep v. Dent, 914 F. Supp. 1462, 1466 (D. Ky. 1996)*. The RFRA has no bearing on this case.

In this case the appellant equates his status with those of the appellants in *Overton.* The appellant argues that because in his case there was no "alternative means available to inmates to communicate with their minor family members," the restriction fails the *Turner* test and is unconstitutional. We disagree. First, the rule in the appellant's case restricting communication with minors applies only to "convicted sex offenders involving a minor (including child pornography)," not the entire prison population. This is an important distinction. *See Beard, 126 S. Ct. at 2580.*

Additionally, if a qualified child abuse specialist submitted a letter supporting a confinee's request, the ban could be lifted by the CO. Thus, the concern expressed in *Beard* and *Overton*, that a rule was "a *de facto* permanent ban" was not realized in this case. *Beard, 126 S. Ct. at 2582*; *Overton, 539 U.S. at 134*. If the right conditions were met the ban **[*10]** could be lifted.

In a letter explaining the policy from the CO of the Brig to the parents and guardians of minor children of convicted sexual offenders, the CO explains that essentially all contact between the convicted offender and minor children is prohibited unless approved by him. He explains that the rule is "intended to provide a wide net of protection to minors." He further explains that sex offenders have often abused children other than the ones already identified, both in and outside of the family. He emphasizes that "[s]ecrecy surrounds child sexual abuse" and that children often will not expose the abuse out of fear. Often conversations with children are used to groom them for future molestation. He also stresses that "contact, either direct or indirect with a child can trigger deviant sexual fantasies on the offender's part. Even offenders convicted of possession of child pornography may also have committed unreported 'hands-on' sexual offenses or sexually groomed children."

We find that this policy is reasonably related to the penological interests related to confining this carefully defined segment of the prison population. Because of their offenses, the CO has recognized **[*11]** that special rules must be enforced for this group. The rules not only protect children but also helps minimize sexual fantasies by those incarcerated.

The second part of the test, whether there are alternative means of exercising the right that still remain open to prison inmates, is not an important factor here because any alternative would only serve to undermine the rule and degrade the protections the rule provides. *See Beard, 126 S. Ct. at 2580*.

The third part of the *Turner* test, the extent of the impact accommodating the asserted constitutional right will have on guards and other inmates, including the allocation of prison resources, militates against the appellant. Accepting the CO's statement that even offenders convicted of possession of child pornography may also have committed unreported "hands-on" sexual offenses or sexually groomed children as true, it is impossible to tell whether any individual confined for possession only, may have also done those things. Trying to determine whether a confinee has done these things would not only be impossible, but the impact on the prison staff of investigating possible abuses would be unmanageable.

Finally, we find no, (and none has **[*12]** been suggested) "alternative methods of accommodating the claimant's constitutional complaint . . . that fully accommodates the prisoner's right's at *de minis* cost to valid penological interests." *Beard, 126 S. Ct. at 2580* (citing *Turner, 482 U.S. at 90 -91*).

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, *10 U.S.C. § 866(c)*; *United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. Accordingly, the findings and sentence are

AFFIRMED.

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United States v. Milner

United States Air Force Court of Criminal Appeals

February 7, 2017, Decided

No. ACM S32338

Reporter
2017 CCA LEXIS 84 *

UNITED STATES, Appellee v. Markus A. MILNER, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Milner, 76 M.J. 260, 2017 CAAF LEXIS 238 (C.A.A.F., Apr. 4, 2017)*

Review denied by *United States v. Milner, 2017 CAAF LEXIS 552 (C.A.A.F., May 25, 2017)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Vance H. Spath (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 75 days, forfeiture of $1,000.00 pay per month for four months, and reduction to E-1. Sentence adjudged 16 July 2015 by SpCM convened at Seymour Johnson Air Force Base, North Carolina.

Core Terms

convening, confinement, sentence, conditions, post-trial, legal error, adjudged, clemency, grant clemency, disapprove, showers, trial defense counsel, prejudiced, conditions of confinement, unusual punishment, detention center, recommendation, approve, cruel

Case Summary

Overview
HOLDINGS: [1]-The staff judge advocate (SJA) erred when she advised the convening authority that he was not authorized to reduce the term of confinement. In addition, the SJA presumptively erred when she also advised the convening authority that he was prohibited from setting aside the findings or disapproving the adjudged punitive discharge, but the court concluded that any error did not prejudice appellant; [2]-The SJA, in the Addendum to the Staff Judge Advocate's Recommendation, did not address an alleged legal error. While this omission was error, appellant was not prejudiced; [3]-After reviewing all of the submitted matters, the court was not persuaded that the conditions of appellant's post-trial confinement rose to the level of being so oppressive or disgraceful as to warrant sentence relief under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Outcome
The approved findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Courts Martial, Posttrial Procedure**

The court of criminal appeals reviews de novo alleged errors in post-trial processing. Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least some colorable showing of possible prejudice.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Judicial

Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN2[] Burdens of Proof, Allocation

Failure to timely comment on matters in the staff judge advocate's recommendation (SJAR), to include matters attached to it, forfeits the issue unless there is plain error. R.C.M. 1106(f)(6), Manual Courts-Martial. Under a plain error analysis, the appellant bears the burden of showing: (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN3[] Posttrial Procedure, Actions by Convening Authority

For offenses occurring prior to 24 June 2014, a convening authority has the unfettered discretion to set aside findings or reduce adjudged sentences. Unif. Code Mil. Justice (UCMJ) art. 60(c)(4)(A), *10 U.S.C.S. § 860(c)(4)(A) (2013)*. For offenses occurring on or after that date, a convening authority's power to grant clemency is significantly reduced. Unif. Code Mil. Justice art. 60(c)(4)(A), *10 U.S.C.S. § 860(c)(4)(A) (2014)*. Congress clarified a year later that for courts-martial that include a conviction for an offense committed both before and on/after 24 June 2014, the convening authority has the unfettered discretion to grant clemency as provided in the prior version of art. 60, UCMJ. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291, § 531(g)(2)(A), 128 Stat. 3292, 3365-66 (2014)*; also Air Force Instruction (AFI) 51-201, Administration of Military Justice, para. 9.23.4 (6 June 2013) (as modified by Air Force Guidance Memorandum 2015-01 (30 July 2015)).

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN4[] Posttrial Procedure, Staff Judge Advocate Recommendations

Whether an appellant was prejudiced by a mistake in the staff judge advocate's recommendation (SJAR) generally requires a court to consider whether the convening authority plausibly may have taken action more favorable to the appellant had he or she been provided accurate or more complete information.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN5[] Posttrial Procedure, Staff Judge Advocate Recommendations

R.C.M. 1106(d), Manual Courts-Martial, requires the staff judge advocate's recommendation (SJAR) to comment on any allegation of legal error raised in clemency. When an accused asserts legal error in his post-trial submissions, the SJAR must, at a minimum, include "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review

HN6[] Posttrial Procedure, Actions by Convening Authority

Distinguished from their role in clemency, the role of the convening authority with respect to defense claims of legal error is less pivotal to an accused's ultimate interests. The convening authority can, and should in the interest of fairness and efficiency of the system, remedy legal error. The convening authority is not, however, required to do so. The failure to address a defense claim of legal error in an addendum to a staff judge advocate's recommendation can be remedied through appellate litigation of the claimed error. Consequently, it is appropriate for the court to consider

whether any prejudice may have resulted from the failure to address the defense claims of legal error. An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN7 **Fundamental Rights, Cruel & Unusual Punishment**

Both the *Eighth Amendment* and Unif. Code Mil. Justice (UCMJ) art. 55, *10 U.S.C.S. § 855*, prohibit cruel and unusual punishment. In general, the court of criminal appeals applies the U.S. Supreme Court's interpretation of the *Eighth Amendment* to claims raised under art. 55, UCMJ, except in circumstances where legislative intent to provide greater protections under art. 55, UCMJ, is apparent. The *Eighth Amendment* prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society or (2) those which involve the unnecessary and wanton infliction of pain. A violation of the *Eighth Amendment* is shown by demonstrating: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that the appellant has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, *10 U.S.C.S. § 938*. The court applies these standards de novo.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN8 **Fundamental Rights, Cruel & Unusual Punishment**

The court of criminal appeals anticipates that only in very rare circumstances will it exercise its Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, authority to grant sentence relief based upon conditions of post-trial confinement when the court has found no violation of the *Eighth Amendment* or Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*. Despite the court's significant discretion in reviewing the appropriateness of a sentence, it may not engage in acts of clemency.

Counsel: For Appellant: Major Lauren A. Shure, USAF, and Captain Patricia Encar-nación-Miranda, USAF.

For Appellee: Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire; and Ms. Morgan L. Herrell (civilian intern).[1]

Judges: Before DREW, J. BROWN, and MINK, Appellate Military Judges. Senior Judge J. BROWN delivered the opinion of the court, in which Chief Judge DREW and Judge MINK joined.

Opinion by: J. BROWN

Opinion

J. BROWN, Senior Judge:

At a judge alone special court-martial, Appellant was convicted, consistent with his pleas, of divers use of 3,4-methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance, and possession of MDMA, in violation of *Article 112a*, UCMJ, *10 U.S.C. § 912a*.[2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 75 days, forfeiture of $1,000.00 pay per month for four months, and reduction to E-1. The convening authority approved the **[*2]** sentence as adjudged.

On appeal, Appellant asserts two errors: (1) that the staff judge advocate's recommendation (SJAR) contained erroneous advice regarding the convening authority's ability to grant clemency; and (2) that his post-trial confinement conditions warrant relief under this court's *Article 66(c)*, UCMJ, *10 U.S.C. § 866(c)*,

[1] Ms. Herrell was a law student extern with the Air Force Legal Operations Agency and was at all times supervised by attorneys admitted to practice before this court during her participation.

[2] As a condition of the pretrial agreement, prior to arraignment, the Government dismissed an additional specification of using lysergic acid diethylamide (LSD).

authority to approve only so much of the sentence that, based on the entire record, "should be approved." Finding no relief is warranted on either issue, we affirm the findings and sentence.

I. Background

Appellant used MDMA on nine occasions from approximately 31 December 2013 to 1 March 2015. During this span, he used MDMA with other military members at many different locations. In addition, on 15 April 2015, law enforcement seized two capsules from Appellant's residence that later tested positive for MDMA. This was the basis for the possession of MDMA offense. Appellant pleaded guilty on 16 July 2015. He immediately began his confinement at the Sampson County Detention Center in Clinton, North Carolina—a civilian confinement facility.

The staff judge advocate (SJA), in the SJAR, initially advised the convening authority that, while he did have the authority to provide clemency **[*3]** as to forfeiture of pay and the reduced rank, he did "not have the authority to disapprove, commute or suspend in whole or in part the confinement or punitive discharge." The SJA then recommended that the convening authority approve the sentence as adjudged.

In a 14 August 2015 clemency submission, Appellant's trial defense counsel asserted that, contrary to the SJAR, the convening authority did have the authority to grant clemency as to the confinement portion of the sentence. Trial defense counsel did not, however, assert that the convening authority had the authority to set aside the conviction or punitive discharge, as some of Appellant's uses of MDMA occurred prior to 24 June 2014. Furthermore, trial defense counsel complained of Appellant's conditions of confinement and asserted that the conditions were both a basis to grant clemency and constituted cruel and unusual punishment that warranted the convening authority taking action to investigate and correct.[3] Appellant requested that the convening authority consider reducing his confinement.

The Addendum to the SJAR did not reference or comment on either of these alleged errors, and the recommendation to approve the sentence as adjudged **[*4]** remained unchanged. The convening authority did not grant relief in clemency and approved the sentence as adjudged.

After the convening authority's action, Appellant submitted a separate complaint about the conditions of his confinement to the convening authority and reviewing authorities. Members from the Seymour Johnson legal office visited the facility and investigated the conditions. The General Court-Martial Convening Authority concluded that the conditions did not violate Air Force regulations and were not otherwise unlawful.

II. Discussion

A. SJAR Errors

Appellant alleges two errors in the SJAR: (1) that the SJA incorrectly stated that the convening authority could not reduce Appellant's confinement and (2) that the SJA did not analyze and offer advice on the conditions of Appellant's confinement in the SJAR Addendum.

HN1[] We review de novo alleged errors in post-trial processing. *See United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)*; *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)*. Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." *United States v. Scalo, 60 M.J. 435, 436-37 (C.A.A.F. 2005)* (quoting *Kho, 54 M.J. at 65*).

1. Scope of Clemency Authority

The Government concedes, and we agree, that the SJA erred when she advised the convening authority **[*5]** that he was not authorized to reduce the term of confinement. In addition, the SJA presumptively erred when she also advised the convening authority that he was prohibited from setting aside the findings or disapproving the adjudged punitive discharge. Nevertheless, we conclude that any error did not prejudice Appellant.

HN2[] Failure to timely comment on matters in the SJAR, to include matters attached to it, forfeits the issue unless there is plain error. Rule for Courts-Mar-tial (R.C.M.) 1106(f)(6); *Scalo, 60 M.J. at 436*. Under a plain

[3] On appeal, Appellant no longer asserts that the conditions constituted cruel and unusual punishment. Instead, he requests relief solely based upon this court's unique authority to approve only that portion of the sentence that "should be approved."

error analysis, the appellant bears the burden of showing: (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant. *Kho, 54 M.J. at 65*.

HN3[↑] For offenses occurring prior to 24 June 2014, a convening authority has the unfettered discretion to set aside findings or reduce adjudged sentences. *Article 60(c)(4)(A)*, UCMJ, *10 U.S.C. §860(c)(4)(A) (2013)*.[4] For offenses occurring on or after that date, a convening authority's power to grant clemency is significantly reduced. *Article 60(c)(4)(A)*, UCMJ, *10 U.S.C. § 860(c)(4)(A) (2014)*. Congress clarified a year later that for courts-martial that include a conviction for an offense committed both before and on/after 24 June 2014, the convening authority has the unfettered **[*6]** discretion to grant clemency as provided in the prior version of *Article 60*. Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291, § 531(g)(2)(A), 128 Stat. 3292, 3365-66* (2014); *see also* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.23.4 (6 June 2013) (as modified by Air Force Guidance Memorandum 2015-01 (30 July 2015)).

Here, Appellant was charged and pleaded guilty to a specification that alleged divers uses of MDMA that occurred both before and after 24 June 2014. The SJA reasoned that, since the specification as alleged covered multiple uses of MDMA through 2015, the misconduct as alleged was not complete until after 24 June 2014. Accordingly, the SJA determined that the prior version of *Article 60* did not apply, and she advised the convening authority that he had only limited authority to grant clemency. Appellant's trial defense counsel, while agreeing with the SJA that the new *Article 60* applied, disagreed with *how* the new *Article 60* applied to the confinement portion of the sentence.

It is not necessary for us to resolve whether the SJA's interpretation was correct, or even if it was not correct, **[*7]** whether it constituted plain error. Appellant must still demonstrate a colorable showing of possible prejudice to prevail on this issue. ***HN4***[↑] Whether an appellant was prejudiced by a mistake in the SJAR generally requires a court to consider whether the convening authority "plausibly may have taken action more favorable to" the appellant had he or she been provided accurate or more complete information. *United States v. Johnson, 26 M.J. 686, 689 (A.C.M.R. 1988)*.

The Government was able to demonstrate that any error did not prejudice Appellant. The SJA submitted an affidavit conceding that her advice to the convening authority was incorrect when she advised the convening authority that he did not have the authority to dismiss the findings of guilt, or disapprove, commute, or suspend in whole or in part the confinement or punitive discharge.[5] Regardless, the SJA asserted that even if the convening authority had broader discretion, her recommendation would not have changed and she still would have recommended that he approve the sentence as adjudged.

Most importantly, the convening authority submitted an affidavit stating:

> Even with the knowledge that I may have had the authority to disapprove the findings and the authority to disapprove, commute, or **[*8]** suspend the adjudged sentence in whole or in part, my decision would not have changed. I would not have disapproved the findings of guilt, and I would not have disapproved, commuted, or suspended the adjudged sentence.

As Appellant is unable to demonstrate a colorable showing of prejudice, he cannot prevail on this issue. *See United States v. Smith, ACM 38845, 2016 CCA LEXIS 344 (A.F. Ct. Crim. App. 7 June 2016)* (unpub. op.); *United States v. Gould, ACM S32275, 2016 CCA LEXIS 99 (A.F. Ct. Crim. App. 24 Feb. 2016)* (unpub. op.); *United States v. Collins, ACM S32242, 2015 CCA LEXIS 340 (A.F. Ct. Crim. App. 18 Aug. 2015)* (unpub. op.).

2. Failure to Comment on Conditions of Confinement Allegation

Appellant's trial defense counsel also raised the condition of Appellant's post-trial confinement in his clemency submission. In addition to arguing that

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[4] The convening authority's power under *Article 60*, UCMJ, *10 U.S.C. § 860*, was restricted as part of the National Defense Authorization Act for Fiscal Year 2014 (FY 14 NDAA), ***Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955-57 (2013)***. Pursuant to section 1702(d)(2), this amendment did not take effect until 24 June 2014, 180 days after the FY 14 NDAA was enacted.

[5] It does not appear, however, that the Government concedes this point in this case, and it is not necessary for us to resolve it in this opinion.

Appellant's confinement conditions were a reason for the convening authority to grant clemency, they asserted that the conditions of confinement were also a violation of the *Eighth Amendment*[6] and *Article 55*, UCMJ, *10 U.S.C. § 855*. The SJA, in the Addendum to the SJAR, did not address this alleged legal error. While this omission was error, Appellant was not prejudiced.

HN5[↑] R.C.M. 1106(d) requires the SJAR to comment on any allegation of legal error raised **[*9]** in clemency. When an accused asserts legal error in his post-trial submissions, the SJAR must, at a minimum, include "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4).

HN6[↑] Distinguished from their role in clemency, the role of the convening authority with respect to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton, 47 M.J. 32, 35 (C.A.A.F. 1997)*. The convening authority can, and should in the interest of fairness and efficiency of the system, remedy legal error. The convening authority is not, however, required to do so. *Id.* The failure to address a defense claim of legal error in an addendum to an SJAR can be remedied through appellate litigation of the claimed error. *Id.* Consequently, it is appropriate for this court to consider whether any prejudice may have resulted from the failure to address the defense claims of legal error. *United States v. Welker, 44 M.J. 85, 89 (C.A.A.F. 1996)*. An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant. *Hamilton, 47 M.J. at 36*; *Scalo, 60 M.J. at 436*.

Appellant does not argue how he was prejudiced by the omission of this purported legal error, and though Appellant could renew on appeal his assertion that the conditions constituted a violation **[*10]** of the *Eight Amendment* and *Article 55*, he chose not to do so.[7] Furthermore, in addition to the alleged legal error, it was clear from the clemency submission that the convening authority should also consider Appellant's conditions of post-trial confinement generally in determining whether to grant clemency and whether to initiate an investigation into those conditions. Consequently, Appellant is unable to demonstrate that the SJA's error in failing to address this purported error prejudiced Appellant.

B. Post-trial Confinement Conditions

At the close of Appellant's trial, he entered confinement at the Sampson County Detention Center in Clinton, North Carolina. As we previously noted, Appellant does not contend that the conditions of his post-trial confinement amounted to cruel or unusual punishment in violation of the *Eighth Amendment* or *Article 55*. Instead, Appellant alleges that the conditions of his confinement were so egregious as to warrant sentence relief under *Article 66(c)*. *See United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015)* (providing sentence relief for post-trial confinement conditions that did not constitute a violation of either the Constitution of the United States or *Article 55*).

In a sworn declaration, Appellant states that he was kept in an area of the detention **[*11]** center that was used exclusively for Air Force prisoners; he was only permitted to leave the cell for recreation time or for showers; he was not given any recreation time for the first 25 days, and thereafter only two hours per week; and he was only allowed to shower twice per week. He also told his trial defense counsel, as reflected in his trial defense counsel's affidavit, that once he figured out how to submit requests for extra showers and phone calls, things got progressively better. Appellant also submitted

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[6] ***U.S. CONST. amend. VIII***.

[7] ***HN7***[↑] Both the *Eighth Amendment* and *Article 55*, UCMJ, *10 U.S.C. § 855*, prohibit cruel and unusual punishment. In general, we apply "the Supreme Court's interpretation of the *Eighth Amendment* to claims raised under *Article 55*, except in circumstances where . . . legislative intent to provide greater protections under [*Article 55*, UCMJ,]" is apparent. *United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000)* (citing *United States v. Wappler, 2 C.M.A. 393, 9 C.M.R. 23, 26 (C.M.A. 1953)*). "[T]he *Eighth Amendment* prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)* (quoting *Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*). A violation of the *Eighth Amendment* is shown by demonstrating: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) 'that [the appellant] has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under *Article 138*, UCMJ, *10 U.S.C. § 938*.'" *Id.* (quotation marks and footnotes omitted). Applying these standards de novo, *United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001)*, we find no *Eighth Amendment* or *Article 55* violation.

an affidavit reflecting his counsel's telephonic discussion with Sergeant BS from the detention center who clarified that Air Force prisoners are housed in the same unit used for prisoners in protective custody, they receive the same treatment as those in protective custody, Air Force members neither reside nor interact with prisoners in the general population, and the cell size is the same as general population prisoners. Sergeant BS also told Appellant's counsel that while it is hypothetically possible for the detention center to maintain a general population-type pod where there were no foreign nationals, it would take some work.

In response, the Government submitted an **[*12]** affidavit from the representative from the Seymour Johnson legal office who investigated Appellant's complaints about the conditions of confinement. The inmates in that housing area shower twice weekly, though Air Force prisoners are permitted to request showers more frequently. Recreation time is normally done in conjunction with each time they shower. Air Force confinees may also request additional phone calls. The conditions of confinement for Appellant were less restrictive than the conditions for those who are in solitary confinement as those inmates are not granted showers, recreational time, and phone calls at the frequency permitted for Air Force prisoners. The Government also provided this court the inmate handbook, photographs from the detention facility, and the inmate log book.

In *Gay*, the case that Appellant cites to as support for relief, this court employed its *Article 66(c)* authority to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment* and *Article 55*. *74 M.J. at 742*. In reviewing that decision, our superior court held that, based on the unique facts of that case, this court did not abuse its discretion in doing so. *United States v. Gay, 75 M.J. 264, 269 (C.A.A.F. 2016)*. However, **[*13]** our superior court also noted that *Gay* involved unique facts driven by legal errors in the post-trial process that included both a violation of the appellant's rights under *Article 12*, UCMJ, *10 U.S.C. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. *Id.* Significantly, our superior court emphasized, "In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove." *Id.*

HN8[↑] We anticipate that only in very rare circumstances will this court exercise our *Article 66(c)* authority to grant sentence relief based upon conditions of post-trial confinement when we have found no violation of the *Eighth Amendment* or *Article 55*. *United States v. Garcia, No. ACM 38814, 2016 CCA LEXIS 490 (A.F. Ct. Crim. App. 16 Aug. 2016)* (unpub. op.); *cf. United States v. Nerad, 69 M.J. 138, 145-47 (C.A.A.F. 2010)* (holding that despite our significant discretion in reviewing the appropriateness of a sentence, this court may not engage in acts of clemency.) This case does not present such a rare circumstance. We elect not to grant relief under our *Article 66(c)* authority.

After reviewing all of the submitted matters, **[*14]** we are not persuaded that the conditions of Appellant's post-trial confinement rise to the level of being so oppressive or disgraceful as to warrant sentence relief. There is no evidence he was subjected to physical or mental abuse, singled out for unusual treatment, denied necessary medical attention, or refused any other necessity. Despite Appellant's characterizations, circumstances of his confinement do not appear to involve the extreme segregation often associated with solitary confinement. Nor is there evidence the conditions of his confinement impacted his access to counsel or any other post-trial due process right. Additionally, his allegations were thoroughly investigated by the reviewing authorities and resolved against him. Therefore, we find the extraordinary use of our *Article 66(c)* power to grant sentence relief is not warranted.

III. Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*.

Accordingly, the approved findings and sentence are **AFFIRMED**.

End of Document

United States v. Trebon

United States Air Force Court of Criminal Appeals

July 14, 2017, Decided

No. ACM 38961

Reporter
2017 CCA LEXIS 473 *

UNITED STATES, Appellee v. Joshua J. TREBON, Major (O-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Motion granted by *United States v. Trebon, 2017 CAAF LEXIS 905 (C.A.A.F., Sept. 7, 2017)*

Review denied by *United States v. Trebon, 2017 CAAF LEXIS 1039 (C.A.A.F., Oct. 30, 2017)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Lyndell M. Powell. Approved sentence: Dismissal and confinement for 7 years. Sentence adjudged 23 September 2015 by GCM convened at Joint Base Elmendorf-Richardson, Alaska.

Core Terms

military, sentence, guilty plea, confinement, convening, sexual, good order, fraternization, discipline, defense counsel, matters, conditions, post-trial, pretrial, segregation, enlisted, circumstances, allegations, offenses, days, declarations, alcohol, hunting, rights, terms, trial defense counsel, sexual assault, socializing, witnesses, questions

Case Summary

Overview

HOLDINGS: [1]-Evidence that a commissioned officer went on a camping trip alone with an enlisted member of the Air Force, drank alcohol with the enlisted member at off-base bars, and allowed the enlisted member to call him by his first name, was sufficient to affirm the officer's conviction for fraternization, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*; [2]-There was no merit to the officer's claim that he was denied effective assistance of counsel; [3]-Confinement officials did not violate the officer's rights under UCMJ art. 58, *10 U.S.C.S. § 858*, when they placed him into administrative segregation for 203 days while they investigated an allegation that he had sexual contact with another prisoner; [4]-The officer's sentence of a dismissal and confinement for seven years was not inappropriately severe.

Outcome

The court affirmed the findings and sentence but directed promulgation of a corrected court-martial order to address a mistake that appeared in the original order. correct.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals ("AFCCA") may affirm only such findings of guilty and a sentence, or such part or amount of a sentence, as it

finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*. In United States v. Gay, the AFCCA invoked Article 66(c) to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment to the U.S. Constitution* and UCMJ art. 55, *10 U.S.C.S. § 855*, and the United States Court of Appeals for the Armed Forces ("CAAF") held that the AFCCA did not abuse its discretion in doing so. However, the CAAF noted that Gay involved unique facts driven by legal errors in the posttrial process that included both a violation of the appellant's rights under UCMJ art. 12, *10 U.S.C.S. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. Significantly, the CAAF emphasized that in reaching its conclusion, it was not recognizing unlimited authority of the courts of criminal appeals to grant sentence appropriateness relief for any conditions of posttrial confinement of which they disapproved.

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Sentences, Confinement**

Only in very rare circumstances does the United States Air Force Court of Criminal Appeals anticipate exercising its authority under Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*, to grant sentence relief based upon conditions of posttrial confinement when there is no violation of the *Eighth Amendment to the U.S. Constitution* or UCMJ art. 55, *10 U.S.C.S. § 855*.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Pleas, Providence Inquiries**

The United States Air Force Court of Criminal Appeals reviews a military judge's decision to accept a guilty plea for an abuse of discretion. The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. A military judge must question an accused under oath about the offenses to ensure there is an adequate factual basis for a guilty plea. R.C.M. 910(e), Manual Courts-Martial; Unif. Code Mil. Justice art. 45(a), *10 U.S.C.S. § 845(a)*. It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Criminal Process, Assistance of Counsel**

The *Sixth Amendment to the U.S. Constitution* guarantees a servicemember the right to effective assistance of counsel. In assessing the effectiveness of counsel, the United States Air Force Court of Criminal Appeals ("AFCCA") applies the standard the United States Supreme Court set forth in Strickland v. Washington, and begins with the presumption of competence the Supreme Court announced in United States v. Cronic. Accordingly, the AFCCA will not second-guess the strategic or tactical decisions made at trial by defense counsel.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] **Criminal Process, Assistance of Counsel**

When an appellant attacks the trial strategy or tactics of his defense counsel, he must show specific defects in counsel's performance that were unreasonable under prevailing professional norms, and the United States Air Force Court of Criminal Appeals ("AFCCA") reviews allegations of ineffective assistance of counsel de novo. The AFCCA utilizes the following three-part test to determine whether the presumption of competence has been overcome: (1) Are an appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? And (3) if defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

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HN6[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals reviews sentence appropriateness de novo. The court assesses sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Although the AFCCA is accorded great discretion in determining whether a particular sentence is appropriate, it is not authorized to engage in exercises of clemency.

Counsel: For Appellant: Major Annie W. Morgan, USAF.

For Appellee: Major G. Matt Osborn, USAF; Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, JOHNSON, and SPERANZA, Appellate Military Judges. Judge SPERANZA delivered the opinion of the court, in which Senior Judges MAYBERRY and JOHNSON joined.

Opinion by: SPERANZA

Opinion

SPERANZA, Judge:

A military judge sitting as a general court-martial found Appellant guilty, consistent with his pleas pursuant to a pretrial agreement, of willfully disobeying a superior commissioned officer's order to have no contact with Airman First Class (A1C) CV; violating a lawful general regulation by engaging in sexual relations with and dating A1C CV; sexually assaulting Senior Airman (SrA) JC by causing SrA JC's penis to penetrate Appellant's mouth without SrA JC's consent; committing abusive sexual contact by touching SrA JC's neck, chest, and abdomen with Appellant's mouth and hand with an intent to gratify Appellant's **[*2]** sexual desire and without SrA JC's consent; making false official statements to investigators; wrongfully and dishonorably accusing SrA JC of sexual assault, which under the circumstances constituted conduct unbecoming an officer and gentleman; and fraternizing with SrA CS, in violation of *Articles 90*, *92*, *120*, *107*, *133*, and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 890*, *892*, *920*, *907*, *933*, *934*. The military judge sentenced Appellant to a dismissal and confinement for seven years. Consistent with the terms of the pretrial agreement, the convening authority approved the adjudged sentence.

On appeal, Appellant raises the following errors pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*: (1) the conditions of his post-trial confinement rendered his sentence inappropriately severe, entitling him to sentence relief; (2) his guilty plea to fraternization was improvident; (3) he was selectively prosecuted; (4) he was denied equal access to witnesses and evidence; (5) he was denied effective assistance of counsel; (6) he was subjected to pretrial punishment; (7) he is entitled to a new pretrial hearing; and (8) his sentence is inappropriately severe. We disagree with Appellant's assertions, find no prejudicial error, and affirm. We address **[*3]** Appellant's claims related to his post-trial confinement conditions, his guilty plea to fraternization, the effectiveness of his counsel, and the severity of his sentence. We have considered and reject Appellant's remaining issues, which neither require additional analysis nor warrant relief. *See United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

I. BACKGROUND

Appellant, an accomplished officer selected for command, was married with children. Appellant was also involved in a months-long sexual, dating relationship with A1C CV. In addition to dating and engaging in sexual acts with A1C CV, Appellant befriended SrA CS, with whom he socialized, drank alcohol, and went on a three-day camping trip.

SrA CS was also friends with SrA JC. SrA CS invited SrA JC to a gathering hosted by Appellant. SrA JC interacted with Appellant on approximately two or three more occasions after being invited to do so by SrA CS.

Appellant was scheduled to leave Alaska in late November 2014 to take command of a squadron in Texas. Appellant planned his "going away" party accordingly and invited numerous people from the base. The "going away" party consisted of being driven to and drinking alcohol at several bars. Appellant, A1C CV, SrA JC, and SrA CS were among **[*4]** those remaining at the party's last stop. SrA JC was visibly, heavily intoxicated by this point and the group left the bar after being there for just over an hour. SrA JC's and SrA CS's plans to stay the night at a master sergeant's house fell through when the master sergeant left the party early and went to sleep. The group's designated driver refused to drive SrA JC and SrA CS to SrA CS's house due to hazardous weather conditions. Appellant invited SrA JC and SrA CS to stay the night with him and A1C CV at his house.

Appellant's house was essentially empty at this time; his family and furniture had already departed for Texas. So, SrA JC, SrA CS, A1C CV, and Appellant lay on Appellant's living room floor to go to sleep. SrA JC and SrA CS immediately fell asleep. While SrA JC was sleeping, Appellant lifted SrA JC's sweatshirt over SrA JC's face and kissed SrA JC's neck, chest, and abdomen. Appellant then unfastened SrA JC's pants, pulled down SrA JC's pants, placed his mouth on SrA JC's scrotum and penis, and inserted SrA JC's penis into his mouth. SrA JC eventually realized what was happening, pulled his shirt down, and exclaimed, "What the f[**]k." Appellant responded by rolling away **[*5]** from SrA JC. SrA JC rearranged his clothing and fell back asleep.

The next morning, Appellant drove SrA JC and SrA CS to their cars. SrA JC and SrA CS ate breakfast together. During the meal, SrA JC told SrA CS that Appellant had assaulted him the night before. SrA JC later reported the assault to the installation sexual assault response coordinator (SARC). SrA JC also consented to a sexual assault nurse examination (SANE) that revealed injuries on his penis. The examination included the collection of deoxyribonucleic acid (DNA) samples from SrA JC's lower abdomen, chest, neck, penis, and scrotum. Subsequent analysis revealed the presence of Appellant's DNA on SrA JC's abdomen, chest, neck, penis, and scrotum.[1]

SrA JC and SrA CS stopped communicating with Appellant. Worried, Appellant sent SrA CS text messages inquiring as to why they ceased communications with him. Appellant discussed the "going away" party incident with A1C CV. Appellant sent A1C CV a text message stating that he "sexually assaulted a guy" and another text message declaring "Drunk n horny and 3 some with my bf...lay off."

Within days of the sexual assault, Air Force Office of Special Investigations (AFOSI) agents interviewed **[*6]** Appellant. Appellant lied about what occurred at his house the evening of the "going away" party. After the interview, Appellant lodged his own complaint with the SARC, asserting that he was the victim of a sexual assault that evening.

Appellant's wing commander ordered Appellant to have no contact with SrA JC, SrA CS, and A1C CV. However, Appellant willfully disobeyed the order by talking to A1C CV and not reporting this contact to his chain of command.

Less than two weeks after receiving and violating the no-contact order, Appellant completed a written statement in which he falsely accused SrA JC of sexually assaulting him. Appellant caused this false statement and accusation to be provided to AFOSI.

II. DISCUSSION

A. Post-trial Confinement Conditions

After trial, Appellant was confined at the Naval Consolidated Brig—Miramar (Miramar Brig) near San Diego, California. While serving confinement at Miramar Brig, Appellant was segregated with the Male Special Quarters (MSQ) for just over 200 days until he was

[1] A1C CV's DNA was also found on SrA JC's lower abdomen, chest, and scrotum.

transferred to the Midwest Joint Regional Correctional Facility at Fort Leavenworth, Kansas in October 2016. Accordingly, his access to certain privileges and services was limited or **[*7]** denied. Appellant filed timely complaints with proper authorities concerning the restrictions placed upon him.

In general, Appellant complains that his "post-trial confinement conditions were unnecessarily harsh, without necessity or justification, and in violation of *Article 58, UCMJ, 10 U.S.C. § 858*." Specifically, Appellant contends that he "was kept in segregated confinement conditions, without proper justification." He, therefore, reasons:

> Given there was no rational basis or justification for holding Appellant in segregation for 203 days, this Court should provide the Appellant with meaningful relief, not only to rectify the injustice that was done in this case, but also to incentivize the government to ensure that military members are confined in acceptable conditions.

Citing to *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, and *United States v. Gay, 74 M.J. 736, 740-42 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, Appellant asks us to "approve only so much of [his] sentence as calls for five years confinement and a discharge [sic]."

HN1[] This court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. In *Gay*, this court invoked **[*8]** *Article 66(c)* to grant the appellant sentencing relief even in the absence of cruel or unusual punishment in violation of the *Eighth Amendment*, *U.S. CONST. amend. VIII*, and *Article 55, UCMJ, 10 U.S.C. § 855*. *Gay, 74 M.J. at 742*. The Court of Appeals for the Armed Forces (CAAF) held that this court did not abuse its discretion in doing so. *Gay, 75 M.J. at 269*. However, the CAAF noted that *Gay* involved unique facts driven by legal errors in the post-trial process that included both a violation of the appellant's rights under *Article 12, UCMJ, 10 U.S.C. § 812*, and the ordering of solitary confinement by an Air Force official where an alternative solution was available. *Id.* Significantly, the CAAF emphasized, "In reaching this conclusion, we do not recognize unlimited authority of the Courts of Criminal Appeals to grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove." *Id.*

HN2[] Only in very rare circumstances do we anticipate exercising our *Article 66(c)* authority to grant sentence relief based upon conditions of post-trial confinement when there is no violation of the *Eighth Amendment* or *Article 55, UCMJ*. *United States v. Milner, No. ACM S32338, 2017 CCA LEXIS 84, at *13 (A.F. Ct. Crim. App. 7 Feb. 2017)* (unpub. op.); *United States v. Garcia, No. ACM 38814, 2016 CCA LEXIS 490, at *14 (A.F. Ct. Crim. App. 16 Aug. 2016)* (unpub. op.); *cf. United States v. Nerad, 69 M.J. 138, 145-47 (C.A.A.F. 2010)* (holding that **[*9]** despite our significant discretion in reviewing the appropriateness of a sentence, this court may not engage in acts of clemency). This case does not present such circumstances.

Indeed, Appellant was placed in segregation and formally raised concerns about the restrictions he faced while segregated in MSQ. However, as explained by the Commanding Officer of the Miramar Brig, there was both a rational basis and justification for holding Appellant in segregation for 203 days.

In March 2016, another prisoner accused Appellant of abusive sexual contact, requiring an investigation in accordance with the Prison Rape Elimination Action (PREA). PREA standards required Appellant to be separated from the alleged victim during the investigation. Thus, Appellant was segregated and placed on Administrative Segregation Pending Investigation/Disciplinary Action (ASPID) status. ASPID standards restricted or limited Appellant's access to certain privileges and services.

The investigation uncovered three other prisoners who claimed to have witnessed or experienced "sexual harassment" by Appellant. Appellant was ordered to have no contact with these other prisoners. Consequently, movement de-confliction **[*10]** between Appellant and the prisoners involved in the investigation proved difficult; authorities considered these difficulties when evaluating Appellant's segregation. Appellant's status was periodically reviewed in accordance with standard procedure. In conducting such a review, authorities considered "changes in [Appellant's] program plan[,] the safety of his victim and witnesses[,] and maintaining the good order and discipline of the facility."

The commanding officer at the time "founded" the PREA allegation against Appellant and forwarded the case to the applicable Air Force convening authority for potential disposition. The convening authority decided not to pursue court-martial proceedings against Appellant and

returned the case to the Miramar Brig for "final adjudication." Appellant received a Disciplinary Report for the "inappropriate sexual touching charge, for which he was found guilty[.]" Appellant was "awarded 30 days Full Loss of Privileges and 20 days Loss of Good Conduct Time." Moreover, "[t]he significant time [Appellant] had spent in [segregation] was taken into account and he was awarded a lenient punishment for [the] level of offense." The PREA findings resulted in specific **[*11]** treatment requirements for Appellant. However, because the prisoner victim and witnesses were either attending, or scheduled to attend, the same treatment, the facility could not "manage [Appellant] away from his victim and witnesses who [were] part of those treatment groups or [would] be." Accordingly, the decision was made to transfer Appellant to Leavenworth in order to avoid "compromising both [Appellant's] treatment as well as the effectiveness of his victim's treatment."

The conditions Appellant complains of—contrary to his assertions—were rationally and reasonably imposed to serve a legitimate purpose: the investigation and adjudication of additional allegations of sexual misconduct committed against another prisoner. Moreover, these conditions ensured the integrity of the investigation and the safety of a victim and witnesses, as well as preserved good order and discipline within the confinement facility. We decline to exercise our extraordinary *Article 66(c)* power to grant sentence relief under such circumstances.

B. Guilty Plea (Fraternization)

Prior to trial, Appellant stipulated to the following facts:

> [Appellant] met SrA [CS] while both were assigned to [the same squadron]. **[*12]** [Appellant] and SrA [CS] became friends based on common interests such as hunting and fishing. SrA [CS] joined the accused for social events in Eagle River, Alaska, including steak night on Friday nights at the Veterans of Foreign Wars (VFW) bar. Eventually, on Friday nights, SrA [CS] and [Appellant] would drink alcohol at the VFW, drink alcohol at Tips bar, and then drink alcohol at the Homestead Bar. They called this the "Eagle River Circuit." SrA [CS] also had dinner
> at [Appellant's] house on a handful of occasions. On one occasion, [Appellant] and SrA [CS] traveled to Prince William Sound, Alaska, for a bear-hunting trip. Although other individuals were invited, nobody else was able to go. The trip lasted two to three days. [Appellant] and SrA [CS] borrowed a small boat from a friend and anchored in Prince William Sound to hunt. They drank alcohol and slept in the same cabin in separate beds on the boat. No sexual activity took place between [Appellant] and SrA [CS].
>
> [Appellant] was a commissioned officer and knew that SrA [CS] was an enlisted airman. [Appellant] admits that such fraternization violates the custom of the Air Force that officers shall not fraternize with enlisted **[*13]** members on terms of military equality. [Appellant] admits his conduct was to the prejudice of good order and discipline.

Appellant pleaded guilty to the following:

> knowingly fraterniz[ing] with [SrA CS], an enlisted person, on terms of military equality, to wit: consuming alcoholic beverages together while socializing at off-base bars, socializing at each other's homes, and camping alone together for multiple days, in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality, such conduct being to the prejudice of good order and discipline in the armed forces.

In conducting his providence inquiry with Appellant, the military judge advised Appellant that by pleading guilty to this offense Appellant was admitting that the following elements were true and accurately described what Appellant did:

> First element, is that [during the charged timeframe], you were a commissioned officer in the United States Air Force.
>
> Second element, is that within the state of Alaska, on divers occasions, [during the charged timeframe] you fraternized on terms of military equality with [SrA CS], an enlisted person, by consuming alcoholic beverages **[*14]** together while socializing at off-base bars, socializing at each other's homes, and camping alone together for multiple days.
> The third element is that you then knew [SrA CS] to be an enlisted member.
> The fourth element is that such fraternization violated the custom of the Air Force that officers shall not fraternize with enlisted members on terms of military equality.
> And the fifth element is that, under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces.

The military judge defined "conduct prejudicial to good order and discipline" as "conduct which causes a reasonably direct and obvious injury to good order and discipline." The military judge further explained to Appellant:

> Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors that should be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person, **[*15]** experienced in the problems of military leadership, to conclude that good order and discipline in the armed forces have been prejudiced by the tendency of your conduct to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

Appellant affirmed that he understood the elements and definitions and confirmed he had no questions about any of them. Appellant admitted that the elements accurately described what he did. Appellant believed and admitted that the elements and definitions taken together correctly described what he did. Nevertheless, Appellant now argues that "[t]here was no evidence admitted that others were aware of the relationship[,]" thus, "[t]he military judge failed to conduct sufficient inquiry into the element of conduct being prejudicial to good order and discipline." Appellant consequently contends that we should set aside this fraternization conviction because "[t]he record is absent of evidence showing Appellant's conduct relating to SrA CS had a direct and palpable injury on good order and discipline in [the] armed forces."

In addition to the stipulation of fact, the military judge relied upon his inquiry with Appellant to determine **[*16]** whether an adequate factual basis for Appellant's plea to this charge existed. During the inquiry, Appellant explained he "had a relationship with [SrA CS] where I allowed that relationship to go down to military equality between the two of us, on a more than familiar basis allowed by the standards of the Air Force."

Appellant first described his relationship with SrA CS as a "mentor relationship" centered on "[c]ommon interests, hunting, fishing, kind of took him under my wing." Accordingly, Appellant "[t]ook [SrA CS] hunting and fishing on quite a few occasions." However, Appellant claimed this relationship "crossed the line [when] we started socializing at bars. More hunting trips, etc., with one individual." Appellant further explained that he invited SrA CS to social events and that his conduct "[e]quated down to equality," and he "started treating [SrA CS] as a peer."

Appellant's explanation led to the following exchanges with the military judge:

> MJ: Okay. Was that because you were, did you consider him a friend, essentially?
> ACC: Our relationship developed into being friends, sir, yes.
>
> MJ: Now when you were socializing, if you and [SrA CS] were alone together, was there still kind of that military relationship **[*17]** between the two of you or did that kind of dissolve a little bit and become more of him calling you Josh or anything like that?
> ACC: There was occasion sir when he did use my first name.
> MJ: And did you correct him or did you allow that to occur?
> ACC: Sometimes but not always.
> . . . .
> MJ: Okay. And, again, when you engaged with him on those occasions was it kind of, was it Major to Airman or was it more Josh to [C]?
> ACC: It was more buddies, sir.
> MJ: Did you guys engage in the same things that normal friends talk about, conversations and just friendly—
> ACC: Yes, sir. We had a lot of common interests.

The military judge and Appellant next discussed the three-day bear hunting trip Appellant took with SrA CS. Appellant maintained that the two enjoyed the trip as "[e]qual hunting buddies, sir. Surviving out in the wild."

Appellant clarified his belief that he fraternized with SrA CS on terms of military equality by stating, "When you start allowing somebody to use your first name, sir, you're giving them an equal position with you. You just threw out a custom and courtesy that keeps a separation between the two of you." Appellant also explained that his conduct was detrimental to good order and discipline **[*18]** because "[i]t could show preferential treatment to the unit. It could be assumed preferential treatment to the unit." Appellant asserted that "at the time [he had] a lot of pull amongst a lot of organizations on this base" and others members of SrA CS's unit "would probably think he was getting a benefit,

the gift of having an officer for a friend."

Appellant later acknowledged that other military members, to include SrA CS's enlisted roommates, knew Appellant, an officer, was friends with SrA CS and such knowledge could have impacted good order and discipline.

At the end of his inquiry with Appellant on this offense, the military judge asked, "Do counsel for either side that any additional inquiry is required?" Trial defense counsel responded, "No, Your Honor."

HN3[] We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Blouin, 74 M.J. 247, 251 (C.A.A.F. 2015)*. "The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Moon, 73 M.J. 382, 386 (C.A.A.F. 2014)* (citing *United States v. Passut, 73 M.J. 27, 29 (C.A.A.F. 2014))*. The military judge must question the accused under oath about the offenses to ensure there is an adequate factual basis for a guilty plea. Rule for Courts-Martial 910(e); *see Article 45(a), UCMJ, 10 U.S.C. § 845(a)*. "It is an **[*19]** abuse of discretion for the military judge to accept a guilty plea without an adequate factual basis . . . ." *United States v. Weeks, 71 M.J. 44, 46 (C.A.A.F. 2012)*.

Having examined the entire record, we find no substantial basis to question Appellant's guilty plea. *See United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002)*. Appellant was convinced of and able to describe the facts necessary to establish his guilt of the offense, as charged. *See United States v. Murphy, 74 M.J. 302, 308 (C.A.A.F. 2015)*. Appellant—an O-4 assigned to the installation's Inspector General's office and formerly assigned to the same unit as SrA CS—held a personal friendship with his "equal," E-4 hunting buddy, SrA CS. The friendship between "Josh" (Appellant) and C (SrA CS) was known to other military members. This relationship, under the facts established within the record, was prejudicial to good order and discipline. Thus, the military judge did not abuse his discretion in accepting Appellant's guilty plea to fraternization.

C. Effectiveness of Counsel

Appellant pleaded guilty pursuant to a pretrial agreement he freely entered into with the convening authority. In exchange for Appellant's guilty plea to certain offenses, *inter alia*, the convening authority agreed to withdraw and dismiss with prejudice the Additional Charge and its four specifications **[*20]** alleging Appellant committed various sexual offenses against A1C CV.

The convening authority also agreed to disapprove any confinement in excess of seven years. Appellant signed the offer for pretrial agreement, affirming that he was "satisfied with [his] defense counsel" and "consider[ed] them competent to represent [him] in this court-martial." Appellant further affirmed that his defense counsel fully advised him of "the nature of the charges against [him], the possibility of . . . defending against them, any defense which might apply, and the effect of the guilty plea." Appellant asserted that he "fully underst[ood]" his trial defense counsel's advice.

In accepting Appellant's pleas, the military judge explained each element of each offense to which Appellant pleaded guilty along with the definitions pertinent to each offense. In each instance, Appellant agreed that he understood the elements of each offense and did not have any questions about any of them. Moreover, Appellant agreed that his plea of guilty admitted that the elements accurately described what he did. Appellant also stated that he believed and admitted that the elements and definitions taken together correctly described what he did. After **[*21]** discussing each offense and the factual bases for his pleas with Appellant, the military judge addressed the terms of the pretrial agreement with Appellant.

The military judge found that Appellant fully understood the pretrial agreement and again received affirmative responses from Appellant that he had enough time to discuss his case with counsel, did in fact consult with counsel and receive the full benefit of their advice, was satisfied that his counsel's advice was in his best interest, and was satisfied with his defense counsel. Furthermore, Appellant stated he was pleading guilty voluntarily and of his own free will, no one had made any threat or tried to force him to plead guilty, he had no questions as to the meaning or effect of his guilty plea, he fully understood the meaning and effect of his guilty plea, that he understood that even if he believed he was guilty he had the legal and moral right to plead not guilty and to place upon the government the burden of proving his guilt beyond a reasonable doubt and still wanted to plead guilty to the charges and specifications. His defense counsel similarly informed the court that he had enough time and opportunity to discuss the **[*22]** case with Appellant.

The military judge found Appellant guilty, consistent with his pleas, and the Additional Charge and its specifications were dismissed with prejudice.

Prior to deliberating on an appropriate sentence, the military judge discussed Appellant's post-trial and appellate rights. Appellant's trial defense counsel affirmed that Appellant was advised orally and in writing of his post-trial and appellate rights.[2] In turn, Appellant confirmed that he was advised of these rights, including his right to submit specific matters for the convening authority's consideration prior to action. Appellant had no questions about his post-trial and appellate rights.

After trial, Appellant was personally provided a memorandum from the base legal office with the subject "Submission of Matters to the Convening Authority—United States v. Maj Joshua J. Trebon." This memorandum advised Appellant of his right to submit matters for the convening authority's consideration prior to initial action[3] and to consult with his defense counsel to determine whether to submit such matters.

Appellant acknowledged the time and date he received this memorandum. In addition, Appellant certified that he "consulted with [his] defense counsel concerning [his] right to submit matters for the convening authority's consideration before the convening authority takes action in [his] case." Appellant indicated that he did not waive this right and intended to submit such matters to the convening authority.

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[2] Appellate Exhibit VII is the written advice provided to Appellant by his defense counsel, which included Appellant's affirmation that his defense counsel "satisfactorily answered any and all questions [Appellant] had about [his] post-trial and appellate rights."

[3] The memorandum specifically advised Appellant that these matters may include:

> a. Allegations of errors affecting the legality of the findings or sentence in your case.
>
> b. Portions or summaries of your **[*23]** [Record of Trial (ROT)], or copies of evidence introduced at trial.
>
> c. Matters in mitigation that were not available for consideration at your trial.
>
> d. Clemency recommendations by any court member, the military judge, or any other person.
>
> e. Any other matter you or your counsel believe the convening authority should be aware of before taking action in your case, whether or not available or introduced into evidence at you trial.

Appellant requested, and the convening authority granted, deferral of automatic forfeitures until action. Later, Appellant acknowledged receipt of the staff judge advocate recommendation (SJAR). Consistent with his indorsement of the memorandum, Appellant submitted matters for the convening authority's consideration. Appellant's submission included his request **[*24]** for "leniency and consideration, and grant [sic] any and all forms of clemency you deem appropriate under the given circumstances in accordance with the UCMJ, impact to the victim [SrA JC], the strains on my family, and the true and dedicated officer I once was and still feel I can be again." Appellant supported his request with various character statements. Appellant asserted no legal errors at the time.

Now, on appeal, Appellant maintains that "[h]ad [his] defense counsel advised him of the matters addressed in [his several declarations], Appellant would not have accepted a pre-trial [sic] agreement and would have litigated the allegations against him." Appellant lodges a variety of complaints through several declarations, including claims that his trial defense counsel did not advise him on the outcome of the second preliminary hearing into A1C CV's allegations; they failed to advise about the defense of mistake of fact; they failed to advise him about the elements of the offenses to which he pleaded guilty; they failed to advise him about his rights under *Article 13, UCMJ, 10 U.S.C. § 813*; they failed to properly advise him of his rights to clemency; and they "coerced [him] into making an uninformed **[*25]** [pretrial agreement] decision."

We ordered and received declarations from Appellant's trial defense counsel in response to his claims. Trial defense counsel's declarations addressed the specific allegations raised by Appellant in his declarations.

HN4[↑] The *Sixth Amendment* guarantees Appellant the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competence announced in *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. *See Gilley, 56 M.J. at 124* (citing *United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)*).

Accordingly, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F.*

2009). HN5[] When Appellant "attacks the trial strategy or tactics of the defense counsel, [he] must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Perez, 64 M.J. 239, 243 (C.A.A.F. 2006)). We review allegations of ineffective assistance of counsel de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing Mazza, 67 M.J. at 474).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance **[*26]** . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Gooch, 69 M.J. at 362 (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

The record in Appellant's case and the declarations of trial defense counsel refute Appellant's ineffective assistance of counsel allegations.[4] Trial defense counsel's explanations and actions in this case were reasonable, and their level of advocacy well within the performance ordinarily expected of fallible lawyers. Accordingly, we find trial defense counsel competently represented Appellant. Appellant's counsel were presumed to be competent and Appellant failed to overcome that presumption.[5]

D. Sentence Severity

After being convicted of the offenses to which he pleaded guilty, Appellant faced a maximum sentence of a dismissal, 57 years of confinement, and forfeiture of all pay and allowances. The military judge sentenced Appellant to a dismissal and seven years of confinement. In exchange for Appellant's agreement to plead guilty to certain offenses, *inter alia*, the convening authority agreed to approve no confinement in excess of seven years. Accordingly, the convening authority approved **[*27]** the adjudged sentence.

Now, Appellant seeks sentence relief, positing that "[d]espite the fact that [his] sentence is the result of a pretrial agreement, the confinement that [he] has received as a result of his sentence is disproportionate to the charged offenses." Appellant asks us to "focus on the career accomplishments for which [he] has been recognized." He maintains that his "unjustly severe" sentence "should be reduced to represent the actual crime [sic] committed in relation to the evidence in extenuation and mitigation presented."

HN6[] We review sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. Nerad, 69 M.J. at 146.

We have given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial. We disagree with Appellant and find that his sentence of a dismissal **[*28]** and seven years of confinement *does* "represent the actual crime[s] in relation to the evidence in extenuation and mitigation." Appellant admitted to committing the "actual crimes" of sexual assault, abusive sexual contact, making false official statements to investigators, conduct unbecoming an officer for falsely accusing an Airman of sexually assaulting him, disobeying an order, violating a regulation, and fraternization. Appellant's sentence was not inappropriately severe based on the facts and circumstances of his case.

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[4] Having applied the principles announced in United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997), and considered the entire record of Appellant's trial, a guilty plea during which he expressed his satisfaction with trial defense counsel, we find we can resolve the issues raised by Appellant without additional fact-finding.

[5] In addition to the specific claims identified in this opinion, we considered all other ineffective assistance of counsel claims raised by Appellant in his declarations and briefs pursuant to Grostefon, 12 M.J. 431. We reject those remaining claims as they require no additional analysis nor warrant relief. *See* Matias, 25 M.J. at 363.

III. CONCLUSION

The findings of guilt and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.[6]

End of Document

[6] Appellant noted that the Court-Martial Order (CMO) erroneously identifies the Additional Charge as violating "*Article 12*." This appears to be merely a typographical error and Appellant claimed no prejudice as a result of this error; however, we direct promulgation of a corrected CMO to remedy this mistake.

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov, on this 25th day of September, 2019, and contemporaneously served electronically on appellate defense counsel.

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