IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.A. WAGNER** **J.D. HARTY**

UNITED STATES

v.

Terry L. MOSLEY
Mess Management Specialist Second Class (E-5), U.S. Navy

NMCCA 200100886 Decided 22 March 2005

Sentence adjudged 29 June 2000. Military Judge: W.J. Dunaway. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
WILLIAM E. CASSARA, Civilian Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel
LtCol K.K. TREMBLAY, USMCR, Appellate Government Counsel

HARTY, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of indecent acts or liberties with a child, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members sentenced the appellant to 7 years of confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

This court has carefully examined the record of trial and all post-trial matters and allied papers. We have also considered the 6 assignments of error submitted on behalf of the appellant by the civilian appellate defense counsel (CADC), the appellant's 11 assignments of error explicitly and implicitly advanced pursuant to *United States v. Grostefon*, 12 M.J. 431, 436-37 (C.M.A. 1982), the Government's answers, and related affidavits and replies. We find that the findings and sentence

are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Assignments of Error

The appellant, through CADC, raised the following assignments of error (AOEs):

> I. THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY.
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> II. THE COURT-MARTIAL LACKED JURISDICTION OVER THE APPELLANT BECAUSE THE CONVENING AUTHORITY WAS NOT IN HIS CHAIN OF COMMAND, HE WAS NOT ASSIGNED TO THE COMMAND OF THE CONVENING AUTHORITY, AND THERE IS NO EVIDENCE OF ANY AGREEMENT BETWEEN APPELLANT'S COMMAND AND THE CONVENING AUTHORITY ALLOWING JURISDICTION OVER THE APPELLANT.
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> III. THE ACCUSED DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.
>
> IV. THE DILATORY POST-TRIAL PROCESSING OF APPELLANT'S CASE WAS PREJUDICIAL AND WARRANTS RELIEF.
>
> V. THE APPROVED SENTENCE IN THIS CASE IS INAPPROPRIATELY SEVERE IN LIGHT OF MS2 MOSLEY'S PARTICULAR CIRCUMSTANCES.
>
> VI. WHETHER THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED DUE TO THE GOVERNMENT'S REPEATED FAILURE TO PROVIDE RELEVANT POST-TRIAL DISCOVERY. Supplemental Assignment of Error of 12 Dec 2003.[1]

The appellant explicitly and implicitly raised the following issues pursuant to *Grostefon* (*Grostefon* Issues):

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1 The appellant seeks documents that he believes will establish the validity of his argument raised in AOE II and *Grostefon* Issues I, III, IV and V claiming Naval Air Station (NAS) Pensacola and Chief of Naval Education and Training (CNET) had no authority to take any action in the appellant's case because he was not in their chain of command, and because the convening authorities were accusers. Because we find no merit in those issues, a failure to produce the requested documents does not warrant relief. We note, however, that a copy of the appellant's Temporary Additional Duty (TEMADD) orders are attached to his RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) submission dated 25 April 2001 and to his Motion to Attach of 17 October 2002. A copy of his TEMADD Order Modification dated 2 June 2000 extending his orders to 275 days from the previous 183 days and extending his effective return date to 7 September 2000 is attached to the appellant's Motion to Attach of 7 August 2003.

I. THE CONVENING AUTHORITY FOR NAS PENSACOLA ENGAGED IN ACTUAL/PERCEIVED UNLAWFUL COMMAND INFLUENCE AND PROSECUTORIAL MISCONDUCT TO EFFECT APPELLANT'S CONVICTION BY COURT-MARTIAL AND THAT CONVENING AUTHORITY LACKED JURISDICTION OVER THE APPELLANT, WITHIN THE MEANING OF EXECUTIVE ORDERS AS PRESCRIBED BY THE MANUAL FOR COURTS-MARTIAL RULE FOR COURTS-MARTIAL 201(B)(1), WHEN THE CONVENING AUTHORITY FOR NAS PENSACOLA HAD APPELLANT SENT TEMADD FROM NAVAL AIR FACILITY (NAF) ATSUGI JAPAN, FOR THE SOLE PURPOSE OF TRIAL BY COURT-MARTIAL IN DIRECT VIOLATION OF R.C.M. 306(A), WHICH MATERIALLY PREJUDICED APPELLANT FROM AN IMPARTIAL REFERRAL AND MATERIAL WITNESSES. Motion for Leave to File Supplemental Argument and Supplemental Assignment of Errors of 27 Aug 2002 at 2.[2]

II. GOVERNMENT TRIAL COUNSEL AND TRIAL DEFENSE COUNSEL FAILED IN (THEIR) AFFIRMATIVE DUTIES, EFFECTING AN ACT OF "COLLUSION," BY FAILING TO CORRECT KNOWN AND SHOULD HAVE KNOWN FALSE OFFICIAL ASSERTIONS, MADE TO THE MILITARY JUDGE, WHICH DEPRIVED THE APPELLANT OF A FAIR AND IMPARTIAL TRIAL. *Id*. at 8

III. WHETHER CNET WAS MY ACCUSER AND STATUTORILY DISQUALIFIED FROM CONVENING THE GENERAL COURT-MARTIAL. MS2(SW) Mosley's Motion to Attach of 21 Jul 2003 at 2.

IV. THERE EXISTS NO VALID CONVENING AUTHORITY ACTION, AS PRESCRIBED BY THE CONGRESSIONAL SCHEME ENVISIONED BY 10 U.S.C. 859(a) AND 860(c) AND NAVY REGULATIONS, A SERVICE REGULATION, WHICH HAS THE FORCE OF LAW, WHICH HAS DIRECTLY RESULTED IN APPELLANT BEING DEPRIVED OF VIRTUALLY UNLIMITED RELIEF FROM A CONFLICT-FREE CONVENING AUTHORITY AND THE SERVICE COURT LACKING AN "INDISPENSABLE JURISDICTIONAL PREREQUISITE" NECESSARY FOR REVIEW UNDER 10 U.S.C. 866(c). MS2(SW) Mosley's *Limited and Specific Reply* to the Government Answer Brief of 23 Jul 2003 at 3. (Italics in original).

V. THE CONVENING AUTHORITY[3] HAD AN OTHER-THAN-OFFICIAL INTEREST IN THE APPELLANT'S PROSECUTION AND WAS THEREFORE AN ACCUSER DISQUALIFIED FROM TAKING ANY PRE OR POST-TRIAL ACTION IN THE APPELLANT'S CASE. *Id*. at 7.

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2 The appellant claims he was denied material witnesses because a convening authority in the continental United States rather than at NAF Atsugi referred the charges. At trial, the appellant did not request the trial be moved to NAF Atsugi and requested only 1 witness from NAF Atsugi. AE III.

3 It is not always clear when the appellant is referring to Commanding Officer, NAS Pensacola and when he is referring to CNET as the "Convening Authority."

VI. THE RECORD OF TRIAL IS INCOMPLETE FOR FAILING TO REFLECT TRIAL DEFENSE COUNSEL'S CHALLENGE TO THE COURT-MARTIAL'S JURISDCITION BASED ON THE APPELLANT NOT BEING IN THE CONVENING AUTHORITY'S CHAIN OF COMMAND AND THE CONVENING AUTHORITY'S DISQUALIFICATION AS AN ACCUSER. Appellant's Combined Motion for Leave to File Augment to Previously Presented Errors and to Present Supplemental Errors Within the Meaning of United States v. Grostefon in the Instant Combined Motion of Sworn Facts of 17 Dec 2003 at 6, 13.

VII. WHETHER THE SEIZURE OF APPELLANT'S PERSONAL PROPERTY WITHOUT DUE PROCESS PREVENTED HIM FROM RETAINING THE CIVILIAN COUNSEL OF HIS CHOICE THEREBY DENYING HIM HIS 6TH AMENDMENT RIGHTS. *Id*. at 9.

VIII. WHETHER THE OFFICER WHO ORDERED THE PRETRIAL INVESTIGATION OF THE CHARGES THEN OFFICIALLY RECOMMENDED THAT THE CHARGES BE REFERRED TO A GENERAL COURT-MARTIAL WAS DISQUALIFIED TO DO SO BECAUSE THE SAID OFFICER POSSESSED AN OTHER-THAN-OFFICIAL INTEREST IN THE CASE TO MAKE SUCH DISCRETIONARY DECISIONS AS STATED OR HAD IMPROPER MOTIVES. *Id*. at 11.

IX. WHETHER THE APPELLANT WAS SUBJECTED TO ILLEGAL PRETRIAL PUNISHMENT BY COMMANDING OFFICER, NAS PENSACOLA BY (1) DENYING THE APPELLANT'S REQUESTED USE OF ACCRUED LEAVE WITHOUT AFFORDING THE APPELLANT A CONSTITUTIONALLY REQUIRED HEARING; (2) BY DENYING THE APPELLANT'S PARTICIPATION IN THE SERVICE-WIDE ADVANCEMENT EXAM TO PAY GRADE E-6; AND (3) BY DENYING THE APPELLANT OF HIS NON-FORFEITABLE PERSONAL PROPERTY BY HAVING THE APPELLANT TRANSFERRED FROM NAF ATSUGI TO NAS PENSACOLA, ALL DONE WITH THE INTENT TO PUNISH THE APPELLANT. *Id*. at 14.

X. WHETHER THE APPELLANT IS BEING SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 55, UCMJ, AND THE 8TH AMENDMENT TO THE U.S. CONSTITUTION BY BEING DENIED DENTAL CARE. *Id*. at 14-15.

XI. WHETHER THE PHYSICAL CONDITIONS AT THE PRIOR US DISCIPLINARY BARRACKS (USDB) SUBJECTED THE APPELLANT TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 55, UCMJ, AND THE 8TH AMENDMENT TO THE U.S. CONSTITUTION. Appellant's Combined Motion for Leave to File his Sworn Affidavit in Support of His Previously Filed Claims of Pretrial Punishment, Unlawful Command Influence and Cruel and Unusual Punishment of 29 Apr 2004 at attached affidavit.

Background

The victim, Y.M., was born on 10 July 1985. The appellant married Y.M.'s mother in April 1993. From June 1995 to May 1996 the family lived in base housing at NAS Jacksonville. The appellant, and Y.M.'s younger sister, would be home when Y.M. got home from school, usually around 1415. Y.M.'s mother worked late and got home between 1900 and 2000. During the period June 1995 to May 1996, the appellant did, on more than one occasion, tell Y.M.'s younger sister to watch television in another room while the appellant and Y.M. remained in the children's bedroom. There, the appellant would touch Y.M. on her private area both above and under her clothes.

In May 1996, while the appellant was deployed, the appellant's wife and her two children moved off base to 1502 Challenger Court where they lived until January 1997. Another Sailor moved in with the appellant's wife and children in May 1996, but deployed for six months in June 1996. The appellant and his wife never lived together after May 1996. During the time Y.M. lived at 1502 Challenger Court, the appellant came over to watch Y.M. and her sister when Y.M.'s mother was home sick on one occasion. On that occasion, the appellant and the two girls were watching television on the bed in the girls' bedroom. According to Y.M., the appellant had her squeeze his penis until he ejaculated, he rubbed her private area with his finger, and then put his finger inside Y.M.'s vagina. Y.M. screamed and jumped out of bed telling the appellant she was going to tell her mother. The appellant grabbed Y.M.'s arms and told her not to tell her mother. Y.M. went to her mother's bedroom, told her mother what happened, and a confrontation occurred between the appellant and Y.M.'s mother. The appellant returned to Y.M.'s home two days later and apologized to Y.M., stating he was drunk and that it would never happen again.

Y.M.'s mother did not report the abuse until June 1999, after the appellant transferred to NAF Atsugi, Japan. To resolve the allegations, NAF Atsugi transferred the appellant to NAS Pensacola, Florida on TEMADD orders on 8 December 1999 for an approximate period of 183 days with an estimated return date of return 7 June 2000.[4] NAS Pensacola convened an Article 32, UCMJ, investigation and recommended charges be referred to a general court-martial. The case was sent to CNET for a referral decision. CNET convened a general court-martial on 20 January 2000 and referred the charges on 23 February 2000. The appellant was arraigned on 3 March 2000. NAF Atsugi modified the appellant's TEMADD Orders on 2 June 2000, extending his orders until approximately 7 September 2000.[5] The appellant's court-martial trial proceeded on 26 June and adjourned on 29 June 2000.

4 Appellant's Motion to Attach of 17 Oct 2002 at attached TEMADD Orders.

5 Appellant's Motion to Attach of 7 Aug 2003 at attached TEMADD Orders Modification.

At the time of trial the appellant had served more than twelve years on active duty including more than 4 years on the USS SPRUANCE (DD 963).[6] The appellant was entitled to wear numerous decorations and had received numerous letters of appreciation and commendation. Senior enlisted personnel testified and submitted letters on his behalf. The appellant had a prior special court-martial conviction for travel claim fraud and received nonjudicial punishment (NJP) for Driving Under the Influence of Alcohol (DUI).

Assignments of Error
Factual Sufficiency

For his first AOE, the appellant contends the evidence is factually insufficient to support a finding of guilty of indecent acts or liberties with a child. We disagree.

A military Court of Criminal Appeals has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). In doing so, this court's assessment of both legal and factual sufficiency is limited only to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)(citing *Turner*, 25 M.J. at 325).

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Spann*, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), *aff'd*, 51 M.J. 89 (C.A.A.F. 1999).

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members.

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6 DE-A, a Stipulation of Fact, states the appellant was assigned to the USS SPRUANCE from 3 December 1992 through 10 October 1997.

Art. 66(c), UCMJ. Further, we may believe one part of a particular witness' testimony yet disbelieve another part. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ.

To support the appellant's conviction under Article 134, UCMJ, for indecent acts or liberties with a child, the Government must establish the following five elements beyond a reasonable doubt:

> (1) That the accused committed a certain act upon or with the body of a certain person;
>
> (2) That the person was under 16 years of age and not the spouse of the accused;
>
> (3) That the act of the accused was indecent;
>
> (4) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both, and;
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 87b(1).

The appellant was charged with and found guilty of indecent acts or liberties with a child on divers occasions from on or about August 1995 to 1997. The evidence of indecent acts on divers occasions consists of Y.M.'s testimony that, on more than one occasion, the appellant rubbed her private area both on top of and under her clothes when she would come home from school and while her mother was at work. The appellant would send Y.M.'s younger sister to another room so he could be alone with the victim. Y.M.'s younger sister, Y.B., testified that the appellant sometimes would not let her play with Y.M. and would tell her to go watch television in their mother's bedroom. The appellant admitted that he would send the younger sister to another room but only when the two girls could not agree on what to watch on television. These events could only have happened prior to May 1996, because the appellant did not live with his wife and stepchildren after that time.

Y.M.'s testimony of a single act of indecent liberties is specific and confirmed by her younger sister and her mother. All three remember consistent parts of that event. Y.M. testified that the appellant had her squeeze his penis until he ejaculated and rubbed her private area with his hand under her clothes.

Only when he put his finger inside her vagina, causing her pain, did she scream and jump out of bed. Y.M. told the appellant that she was going to tell her mother what he did and the appellant grabbed her arms and told her not to tell. Y.M.'s younger sister testified that she remembered an incident when she, her sister Y.M., and the appellant were in bed together watching television when Y.M. suddenly screamed and jumped out of bed. The appellant grabbed Y.M.'s arms and Y.M. broke away and ran to their mother's bedroom. Y.M.'s mother testified that she recalls an event when she was at home sick and asked the appellant to come over and watch the kids. They lived at 1520 Challenger Court at the time so it had to occur between May 1996 and January 1997. The mother remembers Y.M. coming into her room hysterical and stating the appellant touched her private area. The appellant stood in the bedroom doorway telling Y.M. that she was lying. Y.M.'s mother told the girls to go to their room so she and the appellant could discuss the matter. A heated confrontation occurred between Y.M.'s mother and the appellant, resulting in the appellant running from the house. Y.M., her sister, and their mother all remember that the appellant returned to their house two days later and apologized to Y.M. for what he had done and promised that it would never happen again. Y.M. testified that she was not married to the appellant when these acts occurred. We find that these acts are both prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

We have carefully examined all of the evidence admitted on the merits. We conclude that the evidence is both legally and factually sufficient. We are convinced beyond a reasonable doubt of the appellant's guilt. We, therefore, decline to grant relief.

Jurisdiction

For his second AOE, the appellant contends the court-martial lacked jurisdiction over him because the convening authority was not in his chain of command.[7] We disagree. NAF Atsugi transferred the appellant to NAS Pensacola. Once transferred, the appellant was in the NAS Pensacola chain of command.

The appellant's argument is based on a false premise: that NAF Atsugi was the only convening authority that could convene a court-martial and refer charges against him to that court-martial. The President has clearly stated that "Any convening

7 The appellant raises his jurisdictional claim for the first time on appeal and pursuant to *Grostefon*. In *Grostefon* Issue II, the appellant alleges the trial counsel and trial defense counsel colluded with each other to withhold this jurisdictional information from the military judge. In *Grostfon* Issue VI, however, the appellant alleges the jurisdictional issue was raised and litigated but is missing from the record of trial thereby creating an incomplete record issue.

authority may refer charges to a court-martial convened by that convening authority." RULE FOR COURTS-MARTIAL 601(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). In the Discussion that follows the rule, we are advised "the convening authority may be of any command, **including a command different from the accused**." (emphasis added). In *United States v. Talty*, 17 M.J. 1127, 1130 (N.M.C.M.R. 1984), we held that the transfer of the accused from the convening authority's command prior to the convening of the accused's special court-martial did not deprive the court-martial of jurisdiction.

While it is true that an accused is normally assigned to, or under the cognizance of the convening authority that convenes the court-martial and refers charges to that court, that is not a jurisdictional prerequisite of the court-martial. *See United States v. Jones*, ___ M.J. ____, No. 200401276 (N.M.Ct.Crim.App. 16 Feb 2005). In any event, the appellant was assigned to NAS Pensacola and under the cognizance of that command. NAS Pensacola properly forwarded the appellant's case to CNET who ultimately convened a general court-martial and properly referred appellant's charges to that court-martial. We find absolutely no merit in the appellant's jurisdictional attack.[8]

Effective Assistance of Counsel

For his third AOE, the appellant asserts that he received ineffective assistance of counsel and requests this Court set aside the findings of guilt. We disagree and decline to do so.

The Sixth Amendment to the United States Constitution and Article 27, UCMJ, guarantee an accused the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 (1970); *United States v. Ingham,* 42 M.J. 218, 223 (C.A.A.F. 1995). To prevail on a claim of ineffective assistance, however, the appellant must overcome the strong presumption his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington,* 466 U.S. 668, 689 (1984). Appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice,

8 We have reviewed *Grostefon* Issue I attacking jurisdiction by claiming NAS Pensacola lacked jurisdiction over the appellant due to unlawful command influence and prosecutorial misconduct. We have reviewed *Grostefon* Issues III, V and VIII claiming the convening authorities who acted in his case had other than an official interest in the appellant's prosecution and therefore disqualified from acting in his case as type-3 accusers. We have also reviewed G*rostfon* Issue IV claiming this court lacks jurisdiction because the convening authority action is invalid because a disqualified convening authority prepared it. We find absolutely no factual or legal support for these allegations and decline to grant relief thereon.

Appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial. *Id.*; *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987). The 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)).

By affidavit[9], the appellant asserts his detailed trial team: (1) only met with him four or five times prior to trial; (2) tried to get him to plead to a lesser charge; (3) never talked to him about his testimony although counsel gave him a list of questions that might be asked; (4) did not discuss cross examination; (5) did not ask all the questions on the testimony preparation sheet; (6) did not tell him they were going to ask him about his DUI; (7) never discussed how he should answer questions about his prior court-martial conviction; and (8) never discussed what questions the Government may ask about the prior court-martial conviction. The Government submitted its own affidavits from the trial defense counsel and assistant trial defense counsel refuting these claims.[10] The factual basis, therefore, is subject to competing affidavits.

In *United States V. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), our senior court announced the following six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims, such as ineffective assistance of counsel, stating:

> In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear. The following principles apply:
>
> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers

9 Appellant's Motion to Attach of 8 Nov 2002 at attached affidavit of 28 May 2002.

10 Government's Motion to Attach Affidavits of Detailed Defense Counsel and Assistant Defense Counsel of 9 Feb 2005.

> an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.
>
> Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding. During appellate review of the DuBay proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

See United States v. Singleton, ___ M.J. ____, No. 04-5004 (C.A.A.F. Jan. 7, 2005).

We believe this factual dispute can be resolved under *Ginn*'s first and fourth principles. We will address each allegation contained in the appellant's affidavit within those principles.

The appellant's allegations numbered (1), (2), (5) and (6) can be resolved under *Ginn*'s first principle: if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis. The appellant claims his defense team (1) only met with him four or five times prior to trial; (2) tried to get him to plead to a lesser charge; (5) did not ask all the questions on the testimony preparation sheet; and (6) did not tell him they were going to ask him about his DUI.

There is no mandatory number of times a defense counsel must meet with his client. We cannot find that four or five client meetings is somehow a *per se* deficient defense performance. The appellant claims his defense team was deficient in trying to get him to plead guilty to a lesser charge. Trial defense counsel should keep their options open while preparing their defense. In hindsight, that was very good advice and hardly deficient. The

appellant further claims his defense team was deficient because they did not ask every question contained on a witness preparation list. While we know what questions were asked, the appellant does not inform us which questions were not asked. We do not believe that the failure to ask every question on a question list to be deficient. Assuming these allegations to be true, they do not warrant relief.

The sixth allegation is troublesome. There is no explanation for trial defense counsel raising the issue of prior misconduct, other than the appellant's prior special court-martial. Trial defense counsel had successfully litigated a motion *in limine* to exclude the Government's use of a prior civilian DUI conviction. Record at 81-82; Appellate Exhibit IX. During direct examination of the appellant, trial defense counsel disposed of the appellant's special court-martial conviction and then asked the appellant if he was involved in any trouble after serving his special court-martial punishment. The appellant stated that he received NJP in 1995 or 1996 for a DUI.[11] Record at 437.

The introduction of alcohol-related misconduct was not damaging as an isolated matter, however, when placed in context with other testimony it became an issue. The victim's mother had already testified that her marriage to the appellant broke up because of the appellant's alcohol use, Record at 306, and the victim testified the appellant apologized for his actions claiming he had been drinking alcohol the night he molested her. Record at 236. Bringing the appellant's DUI into evidence merely bolstered the victim's and her mother's testimony. We believe the introduction of the appellant's DUI was deficient defense representation, however, given all the evidence against the appellant we are convinced that it did not prejudice him to the point of denying him a fair trial.

The appellant's allegations numbered (3),(4),(7) and (8) can be resolved under *Ginn*'s fourth principle: if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue. The appellant claims his defense team (3) never talked to him about his testimony although counsel gave him a list of questions that might be asked; (4) did not discuss cross examination; (7) never discussed how he should answer questions about his prior court-martial conviction; and (8) never discussed what questions the Government may ask about the prior court-martial conviction.

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11 The appellant's motion *in limine*, Appellate Exhibit IX, refers to a 12 April 1996 civilian conviction for DUI. There is no reference to an NJP for DUI.

The record of trial shows the appellant was well prepared for direct examination. The questions were articulate and the appellant's answers were focused and short. The appellant admits he was given a list of questions to help him prepare for direct examination. The record of trial compellingly demonstrates the improbability of allegation number (3).

The record also shows the appellant's cross-examination answers were not focused or short and that the appellant chose to argue with trial counsel rather than simply answer the questions. The appellant opened the door for additional and damaging cross-examination questions. The appellant merely had to take responsibility for the prior court-martial conviction and leave it at that. The appellant simply refused to admit guilt even though he had been convicted. The record of trial compellingly demonstrates that as to allegation numbers (4), (7), and (8) the cross-examination debacle was of the appellant's own making and had nothing to do with deficient defense representation.

CADC alleges his own list of trial defense counsel deficiencies. We will only discuss those that are in addition to the appellant's list of alleged deficiencies. CADC adds additional allegations that the trial defense team was deficient by (1) not discussing with the appellant whether he should testify; (2) deciding that the appellant should testify; (3) improperly handling the admission of the appellant's prior conviction; and (5) presenting the theory that someone other than the appellant molested the victim.

The appellant would have us believe, through his affidavit and CADC's brief, that the appellant was a passive participant in his own court-martial defense. The record of trial shows a completely different picture. The appellant provided his counsel with a list of possible witnesses (Record at 13); alibi information that led to the withdrawal of one specification of indecent liberties[12] (Record at 41); provided counsel a letter written by the victims' mother (Record at 458; DE-C, DE-E); and personally directed counsel to oppose a lesser included offense instruction (Record at 498). The record shows the appellant was an active participant in his own defense at every step and on occasion called the tactical shots.

CADC's assertion that trial defense counsel did not discuss with the appellant whether the appellant should testify is inconsistent with the appellant's affidavit claiming trial defense counsel provided him with a list of questions that could be asked. The assertion the trial defense team made the decision the appellant would testify flies in the face of the appellant's hands-on approach to his own defense. We do not agree that trial

12 The language from the withdrawn specification was added to the sole remaining specification. Record at 80; Charge Sheet.

defense counsel mishandled the introduction of appellant's prior court-martial conviction. It was sound tactics to bring the conviction out on direct in an attempt to limit the Government's use of the conviction later. Advancing the theory that T.C., another Sailor who moved in with the victim and her family, was the perpetrator was a valid defense theory. The defense uncovered documentary evidence the victim's mother had signed official documents claiming to be married to T.C. and having used his social security as that of her military sponsor while married to the appellant. Record at 326-27. It is not absurd to present the idea that the victim's mother was trying to protect T.C. by having her daughter blame the appellant. These additional allegations do not show the trial defense team was deficient in its representation of the appellant. We find that the appellant received effective assistance of counsel and was not denied a fair trial.

Post-Trial Delay

For his fourth AOE, the appellant contends he was denied timely post-trial review based on the number of days that elapsed from the date of sentencing (29 June 2000) until the staff judge advocate's recommendation was issued (12 March 2001). The appellant claims he was prejudiced because he was ineligible for clemency and parole and because the United States Disciplinary Barracks was unable to give him a minimum release date until his sentence was approved. The appellant seeks sentence reduction as an appropriate remedy. Appellant's Brief of 19 Aug 2002 at 17-20. We do not find merit in the appellant's claim.

A Court of Criminal Appeals must review the record in each case referred to it and "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." Art. 66(c), UCMJ. In performing its affirmative obligation to consider sentence appropriateness, the court must take into account "all the facts and circumstances reflected in the record, including [any] unexplained and unreasonable post-trial delay." *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002).

We note that the assistant detailed defense counsel examined the record of trial on 7 December 2000 and the military judge authenticated the record on 24 January 2001.[13] Record at 604. The record of trial consists of 604 typed pages and numerous exhibits and supporting documents. Even with the size of the record considered, we consider the delay in preparing the record

13 The authentication page actually states the military judge authenticated the record on 24 January 2000. Because this is a factual impossibility, we believe the stated year is a scrivener's error and that 2001 is the correct year.

and the military judge's authentication troubling but not unreasonable.

The appellant asserts he was prejudiced because he could not be considered for clemency and parole and because the U.S. Disciplinary Barracks could not calculate his minimum release date until the convening authority took his action. The convening authority took his action on 2 May 2001. On that date any alleged prejudice became moot according to the appellant's own argument. After considering "all the facts and circumstances reflected in the record, including [any] unexplained and unreasonable post-trial delay", *Tardiff*, 57 M.J. at 224, we conclude that the appellant did not suffer any prejudice from the delay and, finding no other basis for relief, we decline to provide the requested relief.

Sentence Severity

For his fifth AOE, the appellant contends the confinement sentence imposed, 7 years, is inappropriately severe considering the appellant's character and service. Appellant's Brief of 19 Aug 2001 at 21-22. We disagree.

Taking into account all the facts and circumstances and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we believe a sentence including 7 years of confinement to be appropriate.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b), MCM. *See generally United States v. Spurlin*, 33 M.J. 443, 444 (C.M.A. 1991).

At the time of trial the appellant had served more than twelve years on active duty. He had served over four years on the USS SPRUANCE alone, was entitled to wear numerous decorations and had received numerous letters of appreciation and commendation. Senior enlisted personnel testified and submitted letters on his behalf including the then Command Master Chief for Washington Naval District. The appellant, however, did not have a clean past. He had a prior special court-martial conviction for travel claim fraud and an NJP for DUI.[14] He had made a remarkable recovery from these indiscretions to rise to the rank of MS2.

14 We assume the NJP was for the same DUI reflected in AE-III rather than 2 separate DUIs.

The gravity of the appellant's crime, however, certainly warranted a substantial period of confinement. A person who held a stepparent position over the child perpetrated the offenses, on divers occasions, on a child of tender years. The victim suffered pain as a result of the appellant's acts. The length of the confinement must be proportional to the offense by taking into account all of the matters previously discussed. We also are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. After careful review and consideration of the record, we find the imposition of 7 years of confinement to be appropriate.

Remaining *Grostefon* Issues[15]
6th Amendment Right to Civilian Counsel

For the first time on appeal[16] and by way of affidavit, the appellant asserts that he was denied access to his personal property located at NAF Atsugi, Japan. The appellant claims the personal property left behind included $8,000 in currency, $3,000 in pearls, and $5,000 in other personal property. He further claims that he informed his detailed defense counsel that he needed that property to hire civilian counsel to handle his case. The Government submitted its own affidavits from the trial defense counsel and assistant trial defense counsel refuting that claim.[17] The factual basis, therefore, is subject to competing affidavits. Pursuant to the principles of *United States v. Ginn* previously addressed, this issue can be resolved under the first, second and fourth principles.

First, there is no error that would result in relief even if the factual dispute was resolved in appellant's favor. The appellant had two attorneys assigned to represent him. The appellant does not claim that he would release those two attorneys from further representation if he retained civilian counsel. The appellant's Sixth Amendment right to counsel was already met. We reject the appellant's claim on that basis. Secondly, the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations. The

15 Grostefon Issues I, III, IV, V, and VIII have been considered with AOE I and found to be without merit. We will specifically address Grostefon Issues VII, X and XI. We have considered Grostefon Issues II, VI and IX and conclude they do not have merit and will not be specifically addressed.

16 Appellant's Combined Motion for Leave to File Augment to Previously Presented Errors and to Present Supplemental Errors Within the Meaning of *United States v. Grostefon* in the Instant Combined Motion of Sworn Facts of 17 Dec 2003 at 9; Appellant's Combined Motion for Leave to File his Sworn Affidavit in Support of His Previously Filed Claims of Pretrial Punishment, Unlawful Command Influence and Cruel and Unusual Punishment of 29 Apr 2004 at attached affidavit.

17 Government's Motion to Attach Affidavits of Detailed Defense Counsel and Assistant Defense Counsel of 9 February 2005 at attached affidavits.

appellant does not state who he wanted to hire or whether he had conversations with a particular civilian attorney who was willing to take the case. The appellant merely alleges that if he had access to his property he would have hired another attorney. We also reject his claim on that basis. Finally, even if the affidavit is factually adequate on its face, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of his allegations. On 3 March 2000 during an Article 39(a) hearing, the appellant was informed of his rights to counsel. The following discussion occurred:

> MJ: In addition to your military defense counsel, you have the right to be represented by a civilian counsel at no expense to the United States. Civilian counsel can represent you alone or along with your military defense counsels. Do you understand that?
> ACC: Yes, I do.
>
> MJ: Do you have any questions about your right to counsel?
> ACC: No, I don't, sir.
>
> MJ: By whom do you wish to be represented?
> ACC: By Lieutenant Rodriguez and Lieutenant Setner, sir.
>
> MJ: Setser?
> ACC: Yes, sir.
>
> MJ: Do you wish to be represented by another attorney, either military or civilian?
> ACC: No,sir.

Record at 5. We discount the appellant's factual assertions and decide the legal issue against the appellant.

Cruel and Unusual Punishment

For *Grostefon* Issues X and XI, the appellant claims that while confined at the **USDB**, he was denied dental care and had to endure harsh conditions at the old USDB all in violation of Article 55, UCMJ, and the Eighth Amendment. The appellant admits that the USDB conditions no longer exist but he still has not received the dental care.[18]

18 Appellant's Combined Motion for Leave to File Augment to Previously Presented Errors and to Present Supplemental Errors Within the Meaning of *United States v. Grostefon* in the Instant Combined Motion of Sworn Facts of 7 Dec 2003 at 14-15; Appellant's Combined Motion for Leave to File his Sworn Affidavit in Support of His Previously Filed Claims of Pretrial Punishment, Unlawful Command Influence and Cruel and Unusual Punishment of 29 Apr 2004 at attached affidavit.

We review *de novo* the issue of whether the appellant has been punished in violation of Article 55, UCMJ, or the Eighth Amendment to the United States Constitution. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002)(citing *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001). Generally, military courts look to federal case law interpreting the Eighth Amendment to decide claims of an Article 55, UCMJ, violation. *Id.; see also United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000).

Our superior court has held that this court has jurisdiction to determine on direct appeal whether the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55, UCMJ. *White*, 54 M.J. at 472. An appellant who asks this court to review prison conditions must establish a "clear record demonstrating both the legal deficiency in administration of the prison and the jurisdictional basis for action." *United States v. Miller,* 46 M.J. 248, 250 (C.A.A.F. 1997).

The appellant claims that he lost a tooth during a basketball game 2 days before his trial. NAS Pensacola inserted a post so a prosthetic tooth could be provided later. The appellant claims that the USDB removed the post and has refused to provide the prosthetic tooth resulting in the appellant's teeth shifting apart. The appellant believes this will result in personal expense to him after he is released from the USDB. The appellant also asserts the conditions at the old USDB included heat, cold, stagnant air, vermin and insects, and falling debris.

Our senior court has applied the Supreme Court's interpretation of the Eighth Amendment to Article 55, UCMJ, claims except where they have found a legislative intent to provide greater protections under the statute. *See United States v. Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953). The appellant's case, however, does not involve a claim that the dental care or confinement conditions warrant a wider degree of protection under Article 55 than the protections applicable to civilians under the Cruel and Unusual Punishment Clause of the Eighth Amendment. We will, therefore, apply an Eighth Amendment standard of review.

The Supreme Court has found that the denial of medical treatment can violate the Eighth Amendment. However, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)(footnote omitted). We conclude that appellant has not demonstrated that his missing tooth is a "serious medical need" or that the USDB's decision not to replace the tooth is the result of "deliberate indifference."

The Supreme Court has also held that "[t]he Constitution 'does not mandate comfortable prisons,' but neither does it

permit inhumane ones...." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)(quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). 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-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety [.]

Farmer, 511 U.S. at 834 (internal citations omitted).

We further conclude the claimed physical conditions of his confinement do not amount to a violation of Article 55, UCMJ, or the Eighth Amendment. As noted above, there is no showing that he was actually pained or injured as a result of these conditions. The absence of a showing of pain or injury, as well as the absence of a showing of punitive intent on the part of prison officials, undermines his legal claim. *See United States v. Sanchez*, 53 M.J. 393, 395-96 (C.A.A.F. 2000).[19] These *Grostefon* Issues have no merit.

Conclusion

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a)

19 For disposition of this case, it is unnecessary to determine whether the appellant exhausted his administrative remedies to complain about his confinement conditions, including his assertion that there are no administrative remedies for denied dental care. *See generally United States v. Miller,* 46 M.J. 248 (C.A.A.F. 1997)*; United States v.* Coffey, 38 M.J. 290 (C.M.A. 1993).

and 66(c), UCMJ. Accordingly, the findings and sentence approved by the convening authority are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court