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

BEFORE

C.L. CARVER **W.L. RITTER** **D.A. WAGNER**

UNITED STATES

v.

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

NMCCA 9900206 Decided 27 April 2005

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.

LCDR R.C. KLANT, JAGC, USN, Appellate Defense Counsel
LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel
Maj DANNY R. FIELDS, USMC, Appellate Government Counsel

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, 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.

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, acting alone, also robbed an off-base convenience store through the use of a loaded handgun. On a third occasion, the appellant stole a 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.

[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.

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 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 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 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.

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 accused and his counsel. *Morris v. Slappy*, 461 U.S. 1, 14 (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 (1984).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The court stated:

> 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.

Id. at 687. This standard is applicable to military cases. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). Counsel

[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.

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 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)).

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 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 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 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. But he makes no specific assertion of deficiencies, and we find none. 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).

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).

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, we will not second-guess the strategic or tactical decisions of defense counsel. *See United States v.*

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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.

[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. 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.

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 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 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

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 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 39a, 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 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).

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 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)).

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

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, 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 that he should not have been assigned to special quarters because of the potential confinement he was facing at trial is not well-taken. The appellant was accused of a series of robberies and attempted robberies with a deadly weapon, as well as serious drug charges. 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 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 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 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.

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

[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, 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."

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 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 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)(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 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).

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 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 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, 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.

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.

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. Without question, a service member is entitled to protection against cruel and unusual punishment under Article 55, UCMJ, as well as

[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.

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*, 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). "[T]he 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 (1994)). 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, as he alleges, the appellant was not deprived of basic human needs. The attachments indicate that the appellant received food and basic 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 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 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 (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 into the reasons why he could not receive publications or certain letters in Spanish, the USDB judge advocate replied, indicating that:

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

> 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.

"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 *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.

When reviewing denials of constitutional rights based upon prison regulations, "the proper inquiry . . . is whether the regulations are 'reasonably related to legitimate penological interest.'" *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989)(quoting *Turner v. Safley*, 482 U.S. 78, 89 (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 (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 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. 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.

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.

For the Court

R.H. TROIDL
Clerk of Court