UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JULIAN LATORRE
United States Air Force

ACM 34670 (f rev)

21 December 2004

Sentence adjudged 16 May 2001 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Mary M. Boone (sitting alone). Linda S. Murnane (*DuBay* hearing).

Approved sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Jeffrey A. Vires, Captain Jennifer K. Martwick, David P. Sheldon, and Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Anthony P. Dattilo, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Kevin P. Stiens, Captain C. Taylor Smith, Captain Stacey J. Vetter, and Spencer R. Fisher (legal intern).

Before

PRATT, MALLOY, and MOODY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PRATT, Chief Judge:

In May 2001, pursuant to his pleas of guilty, the appellant was convicted of wrongful appropriation, divers rapes, forcible sodomies and other indecent acts with a child under the age of 12, traveling in interstate commerce for the purpose of engaging in a sexual act with a minor, transporting child pornography in interstate commerce by

computer, sending lewd and lascivious pictures in interstate commerce by email, and creating and possessing images depicting child pornography, in violation of Articles 121, 120, 125, and 134, 10 U.S.C. §§ 921, 920, 925, 934. The military judge, sitting as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

This case has amassed a considerable and somewhat convoluted appellate history, which is well delineated in our prior opinion and, so, will not be repeated here. *See United States v. Latorre*, ACM 34670 (A.F. Ct. Crim. App. 1 Oct 2003) (unpub. op.). In that prior opinion, pursuant to direction from our superior court, this Court called for a *DuBay* hearing[1] to examine whether the appellant's prior appellate defense counsel was ineffective by failing to afford him the opportunity to submit issues for consideration on appeal under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Said hearing having been accomplished, the case is before us once again for resolution of that issue.

More so than issues of law, this matter ultimately revolves around questions of fact in this case. Over two decades ago, in the *Grostefon* case, our superior court established a requirement that appellate defense counsel invite the attention of this Court (and thereafter, as appropriate, our superior court) to any errors asserted by the appellant. 12 M.J. at 436. Put another way, when an appellant expresses a desire that certain issues be raised on appeal, appellate defense counsel cannot fail to raise those issues, regardless of their perceived merit, without the express consent of the appellant. *Id*. at 437. At issue in this case is the factual question whether the appellant's prior appellate defense counsel gave him an opportunity to raise such issues. If he did not, we must examine whether that failure constitutes ineffective assistance of counsel, as defined by *Strickland v. Washington*, 466 U.S. 668 (1984).

We directed a *DuBay* hearing in an effort to resolve conflicting versions of events as reported in affidavits submitted to the Court by the appellant and his prior appellate defense counsel, Major (Maj) J.[2] *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). At the *DuBay* hearing, both the appellant and Maj J testified, along with the appellant's cousin. Consistent with their prior affidavits and declarations, their testimony recounted two divergent versions of events leading up to the submission of the appellate brief assigning errors on behalf of the appellant.

I. Appellant's Version

As pertinent to the ultimate issue here, the appellant asserts that he spoke to Maj J only twice in the period preceding the filing of his appellate brief. The first time was

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[2] Although several supervisory appellate counsel are associated with the appellant's case, Maj J had primary responsibility for the appeal and, accordingly, is the only counsel who had contact with the appellant during the events in question.

when he called Maj J soon after receiving a letter informing him that Maj J had been assigned to represent him. This conversation occurred around 1 October 2001. During that conversation, which lasted about 10 minutes, the appellant explained who he was and began to discuss his case, indicating that he was concerned about the length of his sentence. Maj J explained, in essence, that he had not yet read the transcript of the appellant's trial, that he would be better equipped to discuss issues after he had done so, that he would call the appellant back when he had read the record, and that the filing deadline was 29 November 2001.

When the appellant had not heard from Maj J as that deadline neared, he called Maj J a second time on or about 27 November. At that time, Maj J reportedly told him, as before, that he had not yet read the record of trial. Maj J told him that he probably would not have a chance to read the record until "after the holidays." When the appellant expressed concern about the 29 November deadline, Maj J indicated that he would get an extension.[3] As before, Maj J told the appellant that he would contact him when he had read the record. According to the appellant, he never did.

Instead, on or about 1 February 2002,[4] the appellant received in the mail a copy of the appellate brief filed by Maj J on his behalf. The appellant was reportedly quite surprised and angry when he realized that it was not a draft and that it had been filed without giving him the opportunity to discuss the issues raised or to discuss other issues of concern to him.

II. Maj J's Version

For his part, Maj J acknowledges the first phone call from the appellant and the general nature of the information exchanged. Indeed, this phone call is documented on an internal form ("Client Contact Sheet") which includes the date "1 Oct 01." In addition, while he has no specific memory of the precise conversation that occurred, Maj J states that his consistent practice during the initial phone conversation would have been to explain various aspects of the appellate process, including the appellant's right to suggest issues for inclusion in the appeal. Maj J has no recollection of a 27 November phone conversation with the appellant, but accepts that, logically, it may well have taken place as the appellant recounts it.

[3] The record indicates that, on 28 November 2001, Maj J filed a request for an enlargement of time from 29 November 2001 to 28 January 2002, which request was granted. The record also indicates that, on 23 January 2002, Maj J filed a request for a further enlargement of time until 27 February 2002, which was also granted. Despite this latter enlargement, the Assignment of Errors brief was filed with the Court on 25 January 2002.

[4] In his hearing testimony, when addressing his receipt of the brief, the appellant did not offer a specific date, but testified, "I want to say it was the last part of the month of January." However, in a letter to his cousin, dated 6 February 2002, the appellant wrote that he received the brief on 1 February.

However, in stark contrast to the appellant's version, Maj J recalls calling the appellant in January 2002, "two or three days" before filing the final appellate brief, and discussing the issues to be raised therein. He testified that he recalls the appellant discussing again the issue of sentence severity. According to Maj J, he specifically remembers this because he did not intend to raise the issue, but after hearing the appellant's insistence and his reasoning, Maj J decided first to raise it as a *Grostefon* issue and, later, felt that he could raise it as a "non-*Grostefon*" issue, which he did. Consistent with his earlier affidavit on the subject, Maj J testified that this was the only issue that the appellant asked him to raise.

III. Hearing Judge's Findings of Fact

With all the minor differences in these versions of events, the ultimate issue of whether the appellant was afforded an opportunity to raise issues on appeal and was, therefore, afforded effective assistance of appellate counsel, revolves around whether the alleged January 2002 phone call occurred, as recounted by Maj J. In this factual setting, the line is clearly drawn. We need not weigh different versions of the content or meaning of that January conversation; rather, we must determine whether or not the conversation took place. Maj J says that it did; the appellant says that it did not.

The military judge who presided over the *DuBay* hearing heard the testimony of both parties (as well as that of the appellant's cousin), and took as exhibits the various declarations and affidavits previously prepared by the parties and other documentary evidence of various written communications. In keeping with the task assigned by this Court, the hearing judge made extensive findings of fact addressing the questions posed by this Court in its order directing the hearing. The hearing judge's findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. *United States v. Richter*, 51 M.J. 213, 220 (C.A.A.F. 1999).

Essentially, the judge found that the first phone call occurred, much as both parties agreed. She also found, despite Maj J's lack of memory of it, that the 27 November phone conversation also took place as described by the appellant. Finally, and most critically here, she concluded from the totality of the evidence that Maj J did call the appellant in January 2002, prior to submitting the final brief assigning errors to this Court, and that the appellant did use that opportunity to express his continuing desire that the issue of sentence severity be raised in his appeal. Referring to this disputed phone call, the hearing judge stated in her findings of fact:

> I am convinced that this conversation occurred, despite the testimony of the appellant, because Maj J testified that he modified the brief after considering whether he could make a colorable argument for sentence severity or whether he had to raise the sentence severity issue pursuant to *Grostefon*. I had the opportunity to observe the demeanor of the witnesses

> and their personal testimony. It is clear that the records kept regarding the various client contacts in this case left much to be desired for purposes of resolving a claim of ineffective assistance of counsel. However, Maj J's testimony seemed consistent with his amending the final brief before filing it, to add the issue of the appellant's sentence and whether it was too severe for the offenses of which he was convicted, and I am therefore convinced Maj J made this call before filing the final brief.

The appellant's current appellate defense counsel argue that we should find this portion of the judge's findings to be "clearly erroneous" and exercise our authority to find instead that the evidence supports the appellant's version of events.

IV. Discussion

A. Facts

As noted earlier, the crux of the issue before us is whether Maj J afforded the appellant an opportunity to raise issues for his appeal. And the crux of that factual issue is whether Maj J called the appellant in January 2002 and, as he claims, discussed the issue he intended to raise (providence of the plea to wrongful appropriation) and an issue that the appellant wanted raised (severity of sentence). This is significant because, if the conversation took place as described by Maj J, it reflects that the appellant knew that he could raise additional issues, did raise an additional issue, and did not raise the remaining issues he later claimed he had wanted to raise.

Faced with starkly divergent testimony on this issue, the hearing judge looked to the totality of the evidence and circumstances to arrive at her findings of fact. We will do the same in assessing whether the hearing judge's findings of fact are "clearly erroneous or unsupported by the record," *Richter*, 51 M.J. at 220, as they relate to the critical January phone call.

While we, like the hearing judge, are not impressed with the recordkeeping habits of Maj J, nor with his memory of general events, we cannot escape the convincing nature of his specific memory of the January phone call. This is so for two reasons. First, as an experienced appellate defense counsel, and given the nature of his prior phone contacts with the appellant, it is fundamental that he would contact his client before filing an assignment of errors on his behalf. It is hard to accept the proposition that Maj J simply skipped this critical step in the representation of his client, especially in the face of other evidence that the contact occurred. Second, the referenced "other evidence" is Maj J's specific memory concerning the discussion of the issue of sentence severity and the fact that the discussion led him to modify the draft brief to include that issue.

This conclusion is also consistent with the prior contacts, as reported by both Maj J and the appellant. In a pre-hearing affidavit, the appellant described the pertinent part of their first phone conversation by stating:

> After I told him my charges, I started to tell him how I felt about the length of my sentence at which point he stopped me and told me that he had not read my record of trial yet and that he wanted to read it first so he would have an idea about what I was talking about.

The appellant testified in the same manner at the hearing. Although Maj J's pre-hearing affidavit does not address the first phone contact or its content, his testimony at the hearing reflects the same general account:

> I remember him asking me if I thought his sentence was kind of severe. And I told him off the top of my head it sounded like an awful lot of time in confinement, but without reading his case I couldn't say. I didn't know what the facts were. I hadn't read his case yet, but once I had, I'd know whether the sentence was appropriate.

According to Maj J, once he had read the record of trial, he initially concluded that the sentence was not inappropriately severe and, thus, prepared a draft brief raising only one issue—the providence of the appellant's plea to the wrongful appropriation charge. He testified that it was not until the January 2002 phone conversation that he had a chance to fully discuss the sentence severity issue with the appellant. Indeed, it was the fact that the appellant was able to change his [Maj J's] mind concerning the viability of that issue, and thus cause Maj J to amend his brief, that convinced the hearing judge that Maj J's recollection of this event is accurate.

However, our confidence in Maj J's account of his January phone call with the appellant is shaken by a significant discrepancy in his testimony. Quite understandably, Maj J's memory of the various contacts with the appellant some two years previous is very spotty. While he remembers the first phone call generally, he acknowledges that he doesn't actually remember, for instance, whether he briefed the appellant on all the preliminary information he routinely conveys during such initial phone contacts. He testified that was his practice, but the blocks on the client contact sheet corresponding to those matters were not "checked off" and the appellant testified that those matters were not discussed. And Maj J does not recall the November phone call at all, but again acknowledges that it might well have taken place as the appellant describes. As for the critical January phone call, like much of his testimony concerning other events, Maj J's memory is driven more by his belief that he *would* have made the call as a matter of his routine practice than by an actual memory of the event. In questioning by trial counsel, this exchange is telling:

> Q. After the phone call and the letter from [the appellant], from the best of your recollection, what would have been the next thing you would have done in his case?
>
> A. In this case I would have had to read the record of trial and after I read the record of trial I do a draft brief.
>
> Q. After the draft brief is done, what would have been your next—if you could remember from this case specifically, what would have been your next step?
>
> A. This is when I generally do—*and I don't remember specifically in this case*—after I write the brief I give the accused a call and let them know that I have written the brief and what issues I plan to raise. (Emphasis added.)

And then again, a few questions later, Maj J continued to recount what happened by relying on what he called his "standard operating procedure" for his appellate cases rather than any specific memory:

> Q. Do you remember when this call would have taken place to [the appellant]?
>
> A. Only from the date that the brief was filed, so given that the brief was filed in January, in the middle of January, I would have called him about two or three days prior to that.

Then Maj J's memory seemed to improve as he recalled the specific fact that he originally had not briefed the issue of sentence severity, but was talked into doing so by the discussion with the appellant, at first agreeing to raise the issue under *Grostefon*, but later reportedly reconsidering and deciding that he could raise the issue without citing *Grostefon*. As trial counsel explored Maj J's specific memory of his discussion with the appellant on this issue, Maj J reinforced his testimony with further details:

> Q. Do you remember any of the factors that he wanted to raise about his sentence length?
>
> A. I don't remember everything. I would have to see my brief, but one thing I do remember is that *he talked about his children* if he didn't get out of confinement until whenever it was—*his children would be grown and he would miss their formative years and I believe both of them are boys and they need their father* and it was things along that line. (Emphasis added.)
>
> Q. Is that discussion written anywhere?

A. Actually, it's on that form [the client contact sheet].

In point of fact, all that's reflected on the client contact sheet is the statement "Client wants to raise issue of inappropriate severe punishment"—an annotation that could just as easily have been made to reflect the appellant's stated concern in the initial phone call in October. In subsequent questioning, Maj J reiterated the point:

> Q. So, in your opinion, he was well aware of his right to submit matters?
>
> A. Yes, he was. And, in fact, not only did he tell me about the punishment, but that he wanted to have the punishment reduced, but the information he gave me, *it could only have come from him. It wasn't part of the record of trial about his children* or anything like that. So not only did he tell me the issue, but he explained it *and if you've seen my brief it's in there.* (Emphasis added.)

Recall that the hearing judge, in arriving at her findings of fact on this disputed phone call, gave considerable weight to this aspect of Maj J's memory, as it seems to validate his version. Likewise, current appellate government counsel reiterate this point in their brief:

> Appellant alleges the January conversation did not occur, but he has not countered the fact the information contained in the brief regarding his children is not located in the record anywhere, and "it could only have come from [appellant]."[5]

What neither the hearing judge, Maj J, or appellate counsel for either side appear to have done, however, is test these assertions by examining the record of trial and the referenced brief filed by Maj J in January 2002. First, contrary to Maj J's testimonial assertion, the record of trial is replete with references to the appellant's sons[6] and could thus have been the source of any information Maj J had included in his brief. However, second, a review of Maj J's brief readily discloses that there is no reference whatsoever therein to the appellant's sons, their formative years, their need for a father—nothing. The brief's scant rationale on the issue of sentence severity contained nothing that was not also present, in many respects in nearly the same or very similar phrasing, in the trial defense counsel's post-trial clemency letter. Thus, significantly, there is nothing contained in the appellate

[5] The quoted language is taken from Maj J's *DuBay* hearing testimony.

[6] By the time Maj J received the "record of trial," it included not only the transcript of the proceedings, but also the allied papers and other post-trial processing materials including, in this case, extensive clemency submissions by and on behalf of the appellant, in which his sons are repeatedly mentioned, and an approved request for waiver of automatic forfeitures specifically for the benefit of said sons.

brief which tends to reinforce Maj J's memory that he must necessarily have gained the briefed rationale from speaking with the appellant in January.

Given this significant "disconnect" in the stated basis of Maj J's memory of these events, we cannot help but question whether he is perhaps remembering a different case—some other case in which the issue of sentence severity was raised. It is not inconceivable that, some two years after the events in question, Maj J might mis-remember this event or confuse or "blend" it with a similar case. Logically, it is less likely that the appellant, who only has one case to remember, would forget an event so critical to his circumstance.

Turning then to indicia that might help us to weigh the appellant's version of events, it is significant that, within a week of the appellant's receipt of the final brief, he wrote a letter to his cousin (1) complaining that Maj J had not contacted him, as promised, prior to filing the brief, and (2) listing a litany of issues he wanted raised in his appeal. Thereafter, on 22 March 2002, with the help of his cousin, the appellant sent letters complaining about this matter to The Air Force Judge Advocate General, the Air Force Inspector General, and the American Civil Liberties Union, delineating his counsel's failure to consult with him prior to filing his appellate brief.

These documented reactions back at the time in question are fully consistent with his testimony at the *DuBay* hearing. Addressing his reaction when he realized that the appellate brief he received had already been filed with the Court, the appellant explained:

> Q. Why were you surprised?
>
> A. Well, because I never saw a draft. You know, like I said before, I wanted to discuss—to see if more issues could be raised and he only raised two issues and I was upset about that because—you know, the fact that he didn't communicate with me at all.
>
> Q. So to be clear, Airman Lattore, when you received the brief, that was the first time that you learned what issues were being raised on appeal on your behalf?
>
> A. That's correct.
>
> Q. And that was—you had not had an opportunity or you did not discuss with [Maj J] prior to that time the contents of your appellate brief?
>
> A. That's correct.

Just as it is difficult to imagine Maj J failing to contact the appellant before filing the brief, it is equally difficult to believe that this appellant, apparently possessed of so many complaints about various aspects of his case and the conduct of his trial defense, received a phone call from Maj J and only raised the one issue of sentence severity. Stated another way, it is difficult to reconcile that the appellant spoke with Maj J in late January, exercised his opportunity to raise the issue of sentence severity (but no others), and within days of receiving the brief, whose contents would presumably have been consistent with that recent discussion, reacted with vehement complaints and an exhaustive list of other issues.

All in all, given Maj J's inexplicably erroneous memory, the decided lack of documentation available from the government, and the telling and timely reaction of the appellant to the receipt of the final brief, we find that the hearing judge's findings of fact, as they relate to the January phone call, are unsupported by the record.[7] In this factual setting, we cannot be confident that this appellant was afforded a full and fair opportunity to raise issues for inclusion in his appellate brief. More importantly, we cannot be confident that this appellant was even afforded the fundamental opportunity to communicate with his appellate counsel and be informed about his appeal. Discounting the disputed January phone call, which we find unsupported by the evidence, the appellant's attempts to communicate with his appellate counsel were repeatedly put off, with an assurance each time that he would receive a call from his counsel once he had read the record of trial. In the absence of credible evidence that such a call took place, we cannot conclude that this appellant was afforded effective assistance.[8]

B. Ineffective Assistance of Counsel

This Court evaluates claims of ineffective assistance of counsel de novo as a question of law. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). The right to effective assistance of counsel extends to the appellate process. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Dorman*, 58 M.J. 295, 297 (C.A.A.F. 2003). The test for ineffective assistance of appellate defense counsel is the same as that for trial defense counsel. *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004); *United States v. Van Hullum*, 15 M.J. 261, 267 (C.M.A. 1983).

[7] As a related point of clarification, we note another portion of a finding of fact that we find unsupported by the evidence. In one of her findings of fact, the hearing judge references in passing "the draft brief the appellant received in January 2002." The evidence does not support a finding that a draft brief was ever mailed to the appellant. Instead, Maj J testified that, after preparing a draft brief, he would have called the appellant and discussed its contents. There is no claim by Maj J, or other evidence of any kind, suggesting that a copy of a draft brief was mailed to the appellant. And there is no attempt or evidence to refute the appellant's consistent claim that the only mailing he received was a copy of the final brief that had been filed with this Court on 25 January 2002.

[8] Although the appellant could have communicated with his counsel in writing at any time during the months leading up to the filing of his brief, it was not unreasonable for him to rely upon repeated assurances from Maj J that, once Maj J had read the record of trial, he would have a chance to discuss the case (and, impliedly, raise any issues of concern).

Applying the litmus test of *Strickland*, we look for deficient performance and prejudice in order to determine whether the appellant's counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

In this case, we need not tarry long on the issue of deficient performance. Under *Strickland*, the appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688; *Adams*, 59 M.J. at 370. Once we conclude, as we have, that appellate counsel, for whatever reason, neglected to communicate with the appellant prior to filing the assignment of errors with this Court, we have no difficulty characterizing that lapse as deficient performance. In cases where good faith attempts to communicate with an appellant are thwarted by lack of knowledge of the client's whereabouts or perhaps by some other fault of the client, no such claim of deficiency can be properly sustained. *See, e.g., United States v. Sanders*, 37 M.J. 628, 632 (A.C.M.R. 1993), *aff'd*, 41 M.J. 185 (C.A.A.F. 1995). Indeed, in most cases, where appellants are sent an initial notification letter, identifying assigned appellate counsel, providing information about various means of contacting that counsel, and providing extensive information about the appellate process, no further communication may be necessary. (*See* Hearing Exhibit 11.) However, in this case, where the appellant had repeatedly demonstrated his desire to communicate further with his counsel, that counsel's failure to engage in substantive communication, through neglect, represents a fundamental flaw in representation. *See Air Force Rules of Professional Conduct*, Rule 1.4 (20 Dec 2002).[9] *See also Tillman v. United States*, 32 M.J. 962, 965, n.5 (A.C.M.R. 1991).

We turn next to the second prong of *Strickland*—prejudice. In the appellate context, it is sometimes more difficult to apply the same measure used to evaluate trial performance, i.e., the "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); *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). Where, as here, the flaw in representation extends to basic communication with the client, it is especially difficult to speculate as to the probability of various appellate results had proper communication been achieved. We will not free the appellant from his burden to establish some degree of likelihood that he has been prejudiced, but where the lapse in representation is so fundamental, the threshold showing of prejudice must necessarily be correspondingly low.

[9] Rule 1.4. Communication.
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ultimately, the burden to show prejudice is met "when the appellant shows that appellate 'counsel's errors were so serious as to deprive the [appellant] of a fair [appellate proceeding] . . . whose result is reliable.'" *Adams*, 59 M.J. at 370 (citing *Strickland*, 466 U.S. at 687). Applying this standard, we decline to hold that every failure to raise identifiable issues on behalf of an appellant results in prejudice per se. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). *See also Van Hullum*, 15 M.J. at 268 ("Of course, there are cases where it is undeniable that even the most talented appellate advocate could not change the outcome of an appeal."). Yet, unlike in *United States v. Douglas*, 56 M.J. 168, 170 (C.A.A.F. 2001), this appellant asserts "more than a vague allegation" that he had issues he wanted to raise for the Court's consideration that "he was unable to discuss with his appellate counsel." Instead, this appellant has identified a number of specific issues and submitted a detailed explanation of each. Because he was never given an opportunity to discuss these issues with his appellate counsel, they were never tested for viability. Would appellate counsel have talked the appellant out of insisting that those issues be asserted under *Grostefon*? Or would the appellant perhaps have convinced his appellate counsel that one or more issues had merit and should be asserted and fully briefed without reference to *Grostefon*? Perhaps the ensuing discussion of these issues would have triggered consideration of other issues? We will not speculate.

As noted above, the apparent performance deficiency in this case extends beyond the duty imposed by *Grostefon* to forward issues raised by the appellant. Rather, it extends to the opportunity to communicate at all with one's counsel--a lapse which goes to the heart of an appellant's right to legal representation. Where, as here, responsibility for that lapse falls squarely on counsel, we find that the appellant has been deprived of a fair appellate proceeding whose result is reliable. *Strickland*, 466 U.S. at 687. Accordingly, we will grant relief.

V. Relief

In view of the deficiency cited above, and the unusual manner in which issues have been identified and presented in the process of appellate review in this case, we believe this appellant is entitled to a fresh start. Accordingly, we grant the appellant a chance anew to raise issues on appeal of his case. This Court will entertain whatever issues the appellant chooses to assign in a brief due within 60 days of this decision, with any extensions requested from, and granted by, this Court. The government will have an

opportunity to file a reply brief to any such assignments of error in accordance with the provisions of our Rules. Courts of Criminal Appeals, Rules of Practice and Procedure, Rule 15 (1 May 1996). Once issues are properly joined, this case will receive expedited review.

OFFICIAL

ANGELA M. BRICE
Clerk of Court