UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MOHAMED M. MOHAMED
United States Air Force

ACM 36421

20 May 2008

Sentence adjudged 13 December 2004 by GCM convened at Brooks City-Base, Texas. Military Judge: Barbara Shestko.

Approved sentence: Dismissal and confinement for 8 years.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major John N. Page, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Martin J. Hindel, and Captain Ryan N. Hoback.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

The appellant was arraigned on a total of seven charges and 31 specifications. Contrary to his pleas, he was convicted of 18 of the 31 specifications.[1] Specifically, he was convicted of two specifications of disobeying orders, one specification of wrongful appropriation, eight specifications of assaults on two different victims, six specifications of communicating threats to four different victims, and one specification of obstruction of justice, in violation of Articles 92, 121, 128, and 134 UCMJ, 10 U.S.C. §§ 892, 921, 928, and 934. A panel of officers sentenced him to a dismissal and confinement for eight years. The convening authority approved the sentence as adjudged.

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[1] We note the Court-Martial Order incorrectly reflects findings in this case. We direct correction of the order in our final paragraph.

Background

The appellant, a Captain with almost five years of service, was the Chief of Resource Management for the Medical Support Agency at Brooks City-Base in San Antonio, Texas. During his active duty tenure, he was married twice. All of the charges, except for the single specification of wrongful appropriation, arise out of events surrounding these two marriages.

In the case of the first marriage, to Maj AID, he was convicted of a single specification of battery for grabbing Maj AID by the neck and side and pushing her into a dresser and on to the floor. He was also convicted of two specifications of threatening her and her child. Finally, he was convicted of a single specification of divers breaches of a no-contact order with Maj AID.

After the first marriage ended, the appellant remarried. His second marriage was to Mrs. LMM, a civilian. Events during this marriage form the basis for the appellant being convicted of six separate specifications of assault consummated by a battery and a single specification of assault with a means likely to produce grievous bodily harm. In addition to the assaults, the appellant was convicted of making various threats to Mrs. LMM and her parents, Mr. KC and Mrs. EC. He was also convicted of a single incident of disobedience of a no-contact order related to his second wife and a single incident of obstruction of justice for his efforts to convince her to "change her story" related to the most significant assault charge.

Finally, unrelated to all of the above, the appellant was convicted of wrongfully appropriating over $500 worth of government equipment. This conviction arises out of his decision to bring a laptop, a scanner, an electronic personal data organizer and other office supplies home for his personal use.

On appeal, the appellant asserts a total of 13 errors, seven related to findings and six related to sentencing or post-trial matters.[2] We have reviewed multiple briefs from both parties and the various post trial declarations admitted before this Court. We have carefully reviewed each assignment of error and address, in detail, the most significant ones below.

Unreasonable Multiplication of Charges

At trial, the appellant alleged that the charges and specifications constituted an unreasonable multiplication of charges designed to exaggerate the criminality of his conduct.[3] In support of this assertion, trial defense counsel highlighted the fact that many

[2] Of the thirteen errors, eight of them are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The appellant complained of the nature of the charging in findings but raised the issue most specifically in sentencing. In sentencing, the appellant styled his request as a motion for the trial judge to find charges and

of the specifications involved similar or identical charged timeframes. While the trial judge denied the motion, finding that the charges were not "multiplicious," she elected to advise the panel of the maximum for each of the charges to give them a "frame of reference as to what the aggravated assault is worth, for instance, in relationship to the communicating a threat."

On appeal, the appellant renews his claim as to the same three distinct groupings of charges and specifications. First, the appellant asserts the four specifications relating to Maj AID constitute an unreasonable multiplication of charges. The appellant contends all of the offenses occurred "within the same time frame . . . deal with the Appellant's contact with AID . . . [and were] separated out . . . to maximize the amount of specifications on the charge sheet."

In the second group, the appellant complains of the three separate assault convictions, all relating to assaults against Mrs. LMM and all occurring in November of 2003. The appellant asserts, "[t]hese assaults were described as somewhat of a continuous course of conduct" all involving Mrs. LMM. Pointing to the fact that they all occurred in the home during the month of November, defense argued the government chose three separate specifications to "maximize the amount of specifications on the charge sheet rather than combining them as one specification that included the language 'on divers occasions.'"

In the third grouping, the appellant complains of two distinctly separate assaults and the threats made during the course of the second assault. The appellant asserts the assaults are "intertwined" and the government separated them out on the charge sheet solely to "maximize the punishment."

As a result of this unreasonable multiplication of charges the appellant asks this Court to dismiss the two threats related to Maj AID, to merge the three assaults against Mrs. LMM that occurred in November 03, to merge two other assaults against LMM, and finally dismiss the charge involving the threats that occurred contemporaneous with the final assault specification related to Mrs. LMM. Granting the appellant's request would reduce the maximum permissible punishment from 33 years confinement to 15 years confinement. Assuming we agree, the appellant requests a new sentencing hearing.

The Manual for Courts-Martial provides, "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." *See* Rule for Courts-Martial (R.C.M.) 307(c)(4), Discussion. In *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), our superior court noted, "even if offenses are

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specifications multiplicious for sentencing. While we recognize that multiplicity and unreasonable multiplication of charges are separate and distinct assertions, we believe that trial defense's argument in support of their request constituted a claim of unreasonable multiplication of charges. The appellee concedes the issue was raised at trial in their reply brief.

not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard -- reasonableness -- to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."

Our superior court has endorsed the following five-part test for determining unreasonably multiplied charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004). The factors are to be balanced, with no single factor dictating the result. *Id.*

Looking to this case, we find no unreasonable multiplication of the charges. While the trial defense counsel objected to the charging at trial, no other factor weighs in the appellant's favor. It is clear from both the testimony at trial and the findings of the panel, each charged specification was a separate and distinct offense that stood or fell on its own merit. Based upon the specificity of the testimony and the existence of independent corroboration the panel found the appellant guilty of just over 60% of the charges. Those remaining are clearly distinct from one another in the time of occurrence. While at first glance the number of charges might suggest overreaching, it is clear that each charge was based on a separate and distinct criminal act.

As for the assertion that the charges unfairly "exaggerate the criminality" of the appellant's acts and thus unreasonably increase his punitive exposure, we also disagree. The appellant's conduct is what increased his criminal exposure. Further, the trial judge's added instruction to expressly advise the members of the maximum for each charge alleviated any potential for unfairness to the appellant in sentence deliberations. Therefore, we deny the appellant's claim of unreasonable multiplication of charges.

Factual and Legal Sufficiency

The appellant makes two claims of factual and legal sufficiency. First, his counsel argues that Additional Charge I and its Specification are factually and legally insufficient.

Second, the appellant himself, pursuant to *Grostefon*, 12 M.J. 431, contends that all of the charges and specifications must fail for a lack of legal and factual sufficiency.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

Additional Charge I and its Specification alleges that between 9 February 2004 and 1 May 2004 the appellant violated a no-contact order issued by his section commander, Major JRW. The factual basis for this violation is undisputed. Shortly after the initial complaint of domestic violence, the appellant was given a direct order to not contact Mrs. LMM. The appellant received this order both verbally and in writing on 9 February 2004. The order expressly prohibited the appellant from contacting his wife through "third parties." Sometime in late February or early March, a casual friend of the appellant and his wife learned he was in confinement and went to visit him. During the course of this visit, the appellant asked the friend to check on his wife and son and ask them to come and visit him. The friend met with Mrs. LMM shortly after the visit and conveyed the appellant's request.

Despite these undisputed facts, we conclude the charge and specification must fail. In addition to the above facts, it is also undisputed that Maj JRW modified his original order sometime after 9 February 2004 to permit Mrs. LMM to visit him in confinement. Maj JRW testified he notified both the appellant and Mrs. LMM that she was permitted to visit him in the confinement facility. Maj JRW also acknowledged this request for visitation came directly from Mrs. LMM and she visited the appellant a number of times in March and April while the order was in effect. While the precise sequence of these events is not clear, it is probable the appellant's request to his friend was a request to have his wife do expressly what his commander had just told the appellant was permissible to do. While the government asserts that the order modification only permitted Mrs. LMM to initiate the contact, the testimony is less than clear. Maj JRW testified he told the appellant he was releasing him from the order for contact with his wife. He also testified he provided no clarification of the order as it related to whether he could ask third persons to check on his wife when he was told that he could have contact with his wife without violating the order.

Taken as a whole, we are not convinced beyond a reasonable doubt as to the exact scope of the order given the appellant concerning contact with his wife. Once Maj JRW modified the order, it is reasonable to believe that the appellant could ask someone to have his wife come and see him. The commander expressly testified he told the appellant the order would be lifted for visits by his wife. Therefore we agree with the appellant that the finding of guilty to Additional Charge I and its Specification is factually insufficient and direct their dismissal. We will address the impact of this dismissal in our sentence reassessment and decretal paragraph below.

As for the remaining charges and specifications, the appellant asserts the evidence is not credible and therefore does not support the convictions rendered. This Court found the testimony of all of the witnesses credible and sufficient to support each of the remaining charges and specifications as factually and legally sufficient and deny the appellant any further relief based upon claims of insufficiencies of the evidence. Further, as it relates to the communicating threats specifications we would also note that this Court considered our superior court's recent discussion of legal sufficiency for such offenses. *See United States v. Brown*, 65 M.J. 227 (C.A.A.F. 2007).

Unlawful Command Influence[4]

The appellant asserts that his trial was subject to unlawful command influence based upon three facts.[5] First, he contends the pretrial confinement officer was pressured into keeping him in pretrial confinement. Second, he contends the Article 32, 10 U.S.C. § 832, officer's refusal to grant verbatim transcripts of testimony was due to unlawful command influence. Third, he contends the military judge received pressure from the base commander to ensure the appellant was convicted and punished.

Our superior court equates unlawful command influence to prosecutorial misconduct. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). It has held, "in cases where unlawful command influence has been exercised, no reviewing court may properly affirm [the] findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *Id.* at 394. This standard also applies when actions of those bearing "some mantle of command authority," other than a convening authority or commander, improperly influence a court-martial. *See United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) (identifying "many instances of unlawful command influence," including a staff judge advocate briefing the court members before trial). When the issue of unlawful influence is raised on appeal, an appellant must: "(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United States v.*

[4] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[5] The appellant's assertions are raised in post-trial affidavits which we reviewed and considered consistent with *United States v. Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997).

Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *Stombaugh*, 40 M.J. at 213); *see also United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003); *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987).

Having reviewed the appellant's assertions in his brief and his post-trial statement, we find no evidence to even suggest unlawful command influence. As to the first two issues, the confinement hearing officer and the lack of a verbatim transcript, we do not believe that either of these contentions even raises the specter of unlawful command influence. The appellant simply asserts that he did not like the decisions they made so command influence must be the cause. A review of the paperwork related to both the pretrial confinement hearing and the Article 32 show no reason to question the independence and propriety of either decision.

As for the third issue, the appellant references comments made by the military judge during trial to support his claim. While we acknowledge that the military judge states on the record that she "wanted to make it clear that [she] was not going to feel undue pressure because leadership was considering my ruling concerning this matter," the appellant has not established facts amounting to unlawful command influence. These comments arose in response to the military judge's decision to exclude some testimony regarding a voice recording. As a result of that decision, the trial counsel discussed a possible Article 62, UCMJ, 10 U.S.C. § 862, appeal of the military judge's ruling with his supervisors and Headquarters Air Force. The military judge's comments clearly are in response to those discussions. Based upon these facts the appellant's claim fails for two reasons. First, there is nothing improper about trial counsel advising the military judge that they are considering an Article 62, UCMJ, appeal. Second, as the military judge notes, she was not influenced by even the perception of influence and continued to rule in the appellant's favor and excluded the voice recording offered by the prosecution.

Sentencing Evidence

At trial and again on appeal the appellant asserts that the military judge erred in allowing testimony from several of the crime victims in sentencing. The prosecution called several of the victims to the stand to discuss the impact the crimes had on each of them and their families. The appellant objected to portions of their testimony at trial, claiming it was inadmissible because it exceeded the scope of permissible sentencing evidence and was highly prejudicial and thus inadmissible under a Mil. R. Evid. 403 balancing analysis. On appeal, the appellant renews his objections to the testimony outlined below.[6]

[6] The appellant objected to other portions of the testimony for these witnesses. The military judge sustained the objections on several occasions and gave appropriate curative instructions. Considering the curative instructions, we only address those matters expressly objected to on appeal.

The first victim, Mrs. EC, testified that as a result of the threats by the appellant to kill her and her husband they were required to leave the state for their own protection. She testified this move disrupted her younger daughter's schooling and caused her to have problems in school, affecting her grades. Mrs. EC also testified the younger daughter has been emotionally affected and has trouble focusing. Finally, Mrs. EC testified twice that she remained certain the appellant was going to kill her and her husband. The second response was given despite the military judge sustaining an objection to such testimony. The military judge did instruct the panel to disregard this portion of her testimony.

The second victim, Maj AID, testified that because of her fear of the appellant she took steps in her personal life to protect her and her daughter. Specifically, she testified she put a security system in her house and she had to teach her teenage daughter how to operate the system. She also testified that as a result of her fear she obtained a will and named a guardian. She testified she had given up on being an effective parent because the fear incapacitated her at times. Finally, she testified she was moved from San Antonio under a "Threatened Airman's Program" (TAP) because of her fears. After trial defense counsel objected to this testimony, the military judge instructed the panel to disregard the TAP testimony. Although the military judge permitted all of the other testimony, she did not allow this final testimony because it had been almost three years since the last offense committed by the appellant on this victim.

The third victim, Mrs. LMM, testified that while dating the appellant they would routinely shop late at night after she got off work in the evening. She testified that around 0100 in the mornings, after these shopping trips, they would stop in an area where the appellant would leave the car for 20-30 minutes to "pee." When an objection to relevancy arose, the trial counsel responded that it was relevant to aggravation evidence surrounding the threats to Maj AID. The indication was these trips were in close proximity to Maj AID's home but that fact was never clearly established. It also was never established that Maj AID was aware of these trips.

R.C.M. 1001(b)(4) governs the scope of permissible evidence in aggravation at sentencing. It provides:

> (4) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

Our superior court in *United States v. Hardison*, 64 M.J. 279, 282 (C.A.A.F. 2007) noted, "[t]here are two primary limitations on the admission of aggravation evidence. First, such evidence must be 'directly relating' to the offenses of which the accused has been found guilty . . . [and second the evidence] must also pass the test of Military Rule of Evidence (M.R.E.) 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact." Further, these limitations do "'not authorize introduction in general of evidence of . . . uncharged misconduct,'" *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001) (quoting Drafters Analysis, *Manual for Courts Martial*, A21-67 (1995 ed.)), and is a "'higher standard' than 'mere relevance.'" *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (quoting *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)).

We review a military judge's decision on admission of sentencing evidence for an abuse of discretion. *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003). If evidence was improperly admitted we must also determine whether or not the appellant was "substantially prejudiced" by the erroneous admission of this evidence. *United States v. Boles*, 11 M.J. 195, 199 (C.M.A. 1981).

We find the military judge properly admitted all of the testimony regarding the impact on the victims and their families. The evidence provided the members "the full measure of loss suffered by all of the victims, including the family." *United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1980); *see United States v. Fontenot*, 29 M.J. 244, 251 (C.M.A. 1989) (rape victim's father permitted to describe events surrounding rape and impact on victim and other family members). The appellant's threats against Maj AID clearly had a continuing impact on her despite the lapse of several years.

With respect to the nighttime trips by the appellant into the woods, while questions exist as to the relevancy of this testimony, we do not believe the military judge abused her discretion when she permitted this testimony. Not only was it preliminary in nature and of limited significance to a proper punishment, it was also clearly of limited prejudicial effect. Therefore, we find the military judge did not abuse her discretion in admitting all of the sentencing evidence in this case.

Article 13 Claims[7]

On appeal, the appellant makes three claims of error centered on an assertion that he was subjected to illegal pretrial punishment during his pretrial confinement. In addition to evidence on the issues presented at trial, consistent with *Ginn*, 47 M.J. 236, we considered all documents related to the request for a post-trial Article 39(a) session, the appellant's post-trial affidavit submitted to this Court, and the affidavit submitted by

[7] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

his counsel in response to the claim of ineffective assistance of counsel claim raised before us on the Article 13 claims.

Article 13, UCMJ, 10 U.S.C. § 813, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citations omitted). Whether the appellant is entitled to credit for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000) (citations omitted); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (citations omitted). Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews de novo. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006) (citations omitted).

At the time of trial, the appellant had been in pretrial confinement for 308 days. He began his pretrial confinement in the Lackland AFB regional confinement facility. After 65 days at the Lackland facility, the appellant was transferred to the Guadalupe County Jail where he remained through trial. At trial, his commander testified the transfer was necessary because of over-crowding at the Lackland facility. At trial and on appeal the appellant makes a variety of allegations in support of his claims that he was subjected to illegal pretrial punishment and his counsel was ineffective in not raising the issue more effectively at trial. In addressing the appellant's assertions of error, we will address them in groupings based upon the relevant factors and merits of the allegations.

First, at trial, the appellant alleged he was denied adequate medical care for his hemorrhoids and constipation while in pretrial confinement. We find that the military judge acted appropriately, when she denied trial defense's request for additional credit for "inadequate medical care.[8]" The appellant alleged that he was denied the proper medical care from 26 July 2004 to 4 August 2004 despite his complaints. The government provided testimony from a physician who indicated that the appellant's care was adequate for his condition. The physician testified the appellant was initially properly treated with a laxative and a cream. When the problems continued the appellant received treatment from a doctor. The military judge, having considered the motion and the testimony of a physician, denied the request for additional credit. The military judge concluded the conditions of the appellant's confinement did not amount to "punishment or penalty, nor that the confinement was more rigorous than necessary." (R1505) We agree. *See Crawford*, 62 M.J. at 413; *McCarthy*, 47 M.J. at 165.

Next the appellant alleges he was subject to illegal pretrial punishment because of the general treatment and conditions he endured at both confinement facilities while in

[8] At trial, this was appellant's sole basis for seeking additional credit for illegal pretrial confinement.

pretrial confinement. In his unsworn testimony in sentencing, in his request for a post-trial 39(a) session, and in his affidavit before this Court he makes a number of assertions of improper treatment. Included in these claims are assertions he was segregated from the other prisoners, that when he was escorted from the facility he was shackled and cuffed, he was denied access to his attorneys, he was never visited by his commander, and he was denied the opportunity to exercise in the county jail.

Even if we were to accept these assertions as facts establishing a claim of illegal pretrial punishment, we would still deny the appellant's second grouping of claims for relief before this Court for two reasons.

First, it is well established that an appellant is not entitled to additional pretrial confinement credit if, in lieu of seeking such a credit at trial, the appellant chooses instead to present the complained of conditions to the sentencing authority in the hopes of obtaining a shorter sentence. *See Inong*, 58 M.J. at 463 (citation omitted). This is precisely what the appellant did in this case. In his unsworn testimony during sentencing, appellant focused almost entirely on the conditions in confinement. He testified to the members that he was subject to segregation, a lack of medical care, a lack of access to the outside world including his lawyers, limited exercise options, a small cell, and a lack of official visitors. In rebuttal to appellant's testimony, his commander testified that he had visited him at the county jail on at least 10 occasions, and that the move to the county detention facility was based upon a lack of space at the Lackland facility. His commander acknowledged that he did shackle and cuff the appellant during trips outside the facility based upon advice from the facility. Furthering the tactical decision to present these "conditions" to the sentencing panel, trial defense counsel, in his sentencing argument, argued for a lesser sentence, contending the appellant had already been punished while in pretrial.

Second while the military judge denied a post-trial request for an Article 39(a) session, she recommended the appellant be credited with 5 additional days of credit for the requirement that he wear a prisoner jumpsuit vice his uniform in the Lackland confinement facility. In response to this recommendation from the military judge, the convening authority awarded 10 days of confinement credit for this violation of Air Force directives. Thus, the appellant has already been compensated, in one form or another, for all of the above conditions of confinement for which he now seeks additional credit based upon his claim of illegal pretrial punishment. Therefore, we deny any relief for these conditions.

Finally, this brings us to the remaining group of the appellant's complaints regarding pretrial confinement. Considering all of his post trial paperwork, including his affidavit to this Court, we believe the remaining claims are best categorized as follows: (1) his claims of religious persecution, including that he was denied the opportunity to practice Islam and served meals at the wrong time during Ramadan, and that confinement

officials used racial slurs in referring to the appellant; (2) his claims of abuse of authority by prison officials, including that the appellant was coerced into signing a document waiving his 'rights" as a commissioned officer, that he was forced to change cells with another prisoner, and that he was insulted by an NCO in confinement; (3) that the county jail was filthy; and (4) that he was deprived of "other" medical care. We find that based upon our superior court's ruling in *Inong*, 58 M.J. 460, the appellant has waived the right to complain today, absent a showing of plain error. We find none.

Article 13 Claim of Ineffective Assistance of Counsel

The appellant alleges that his counsel were ineffective in that they failed to raise the issue of illegal pretrial punishment in violation of Article 13, UCMJ. Normally, as discussed above, the issue is waived on appeal absent plain error. However since the issue also forms the basis of an ineffective assistance of counsel claim, it is necessary to examine the first issue to the extent necessary to resolve the second.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight,* 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *Ginn*, 47 M.J. 236 at 244.

Here the appellant asks us to conclude that his counsel was ineffective for failing to raise a more comprehensive Article 13 motion. The *military* defense counsel responds by noting that he raised an Article 13 motion based upon the appellant's complaint prior to trial that he received inadequate medical care. As for the other conditions the appellant now complains of, we further noted above that his *civilian* defense counsel properly and tactically presented many of them to the panel as a matter in sentencing mitigation. Therefore, any claim of ineffective assistance must rest solely on the "new" issues he raises in his post-trial affidavit.

Considering all of his post-trial paperwork, including his affidavit to this Court, we believe those material to his claim of ineffective assistance of counsel to be: (1) his claims of religious persecution, including that he was denied the opportunity to practice Islam and served meals at the wrong time during Ramadan, and (2) that confinement

officials used racial slurs in referring to the appellant; his claims of abuse of authority by prison officials, including that the appellant was coerced into signing a document waiving his 'rights" as a commissioned officer, that he was forced to change cells with another prisoner and that he was insulted by an NCO in confinement.

Applying the factors set forth in *Ginn,* we conclude we can resolve this assertion of ineffective assistance of counsel based upon the record and the appellate filings. *Ginn*, 47 M.J. at 244. We find the record as a whole, to include the defense counsel's post – trial affidavit and the prosecution's response to the motion for the post-trial Article 39(a) "compellingly demonstrates" the improbability of the appellant's claims of ineffective assistance with respect to these remaining claims. *Ginn*, 47 M.J. at 238 (quoting *United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968)).

With respect to appellant's claims of religious persecution, we find it significant, that not only does his attorney deny, in his post-trial affidavit, any knowledge of the allegations of specific religious persecution, but this denial is further corroborated by the record, itself. A central theme of the trial defense counsel's closing and sentencing argument was that the appellant is a Muslim, and simply because he is a Muslim he faced discrimination and prejudice throughout the process. In light of these arguments, we find any claim that trial defense counsel knew of or should have known that in addition to claims of general discrimination the appellant was denied the opportunity to practice Islam and served meals at the wrong time during Ramadan inherently incredible. We would also add that we believe the record clearly establishes that these claims themselves are highly improbable.

With respect to the appellant's claim that confinement officials overreached their authority, we find the record compellingly demonstrates that they did not. The exhibits show that appellant willingly and knowingly signed a waiver of his right to be exempt from manual labor. The "insult" of which the appellant complains is contained in a DD Form 2711, Initial Custody Classification, and is nothing more than a confinement official's candid assessment of the appellant upon his initial entry into confinement. With respect to the claim that the appellant was segregated from other prisoners, we are not persuaded that this sort of segregation, without evidence of an intent to punish, is illegal pretrial punishment. *Cf. United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985) With respect to the claim that he was shackled and referred to as prisoner, we find that these were in accordance with Lackland and the civilian confinement facility's own internal regulations, and there is no evidence of an intent to punish the appellant.

This leaves us with one remaining claim. The appellant alleges he was forced to exchange cells with another prisoner, and that the cell he was forced to move to was cold and disrupted his sleep. Again, mindful that our task is to assess effectiveness of counsel, we find that even accepting the appellant's assertions on this issue, his counsel's failure to raise this does not rise to the level of ineffective assistance of counsel. *See Ginn*, 47

M.J. at 248 (citing *United States v. Wilson*, 44 M.J. 223 (C.A.A.F. 1996)); *see also* Polk, 32 M.J. at 153.

Finally, we note the appellant's assertions, at trial, to the military judge directly contradict his new claims of additional illegal pretrial punishment in support of his claim of ineffective representation. The appellant told the military judge he agreed with his defense counsel's in court statement, that the appellant had not been punished in violation of Article 13, UCMJ. As our superior court has noted in *Ginn*, "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 whe he would have made such statements at trial but not upon appeal." *Ginn*, 47 M.J. at 248. He has made no such showing.

General Ineffective Assistance of Counsel[9]

In addition to the above specific allegation of ineffective assistance of counsel (IAC), the appellant also asserts IAC generally in his post-trial affidavit. Most significant of his claims are that his counsel failed to prepare for trial by failing to interview critical witnesses; that his attorney refused to allow him to testify; that his attorney failed to present evidence of medical factors that could have excused or mitigated his conduct; and finally that his counsel prevented him from submitting clemency materials at trial.

In response to the appellant's affidavit, this Court considered first and foremost the efforts of all three defense attorneys demonstrated during the course of the four-day trial. The defense team raised dozens of motions and objections in support of their client's cause. They succeeded in convincing the military judge to dismiss three specifications and portions of other specifications. The defense team was also extremely successful in convincing the panel to find the appellant not guilty of eleven specifications outright, not guilty of two greater offenses and not guilty of excepted language in one specification. We also note that the defense submitted lengthy clemency matters and allegations of error post-trial for the convening authority's review prior to action. Finally, in addition to the record we also considered the post-trial affidavit of one of his trial defense counsel.

Applying the law related to ineffective assistance of counsel and applying the principals set forth in *Ginn*, we find the record as a whole, to include the defense counsel's post-trial affidavit "compellingly demonstrates" the improbability of the appellant's claims of ineffective assistance. *Ginn*, 47 M.J. at 238 (quoting *United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968)). On the most serious allegation, that his counsel refused to allow him to testify, the defense counsel provided a statement signed

[9] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

by appellant prior to trial demonstrating the appellant was advised of his right to testify and his knowing and voluntary choice to waive that right. As to the decision to not have his family or friends testify in sentencing, we are completely satisfied, based upon the record and the affidavits, that the defense team made this tactical decision based upon rational grounds and in consultation with the appellant at the time of trial. Therefore, we deny the appellant any relief on his claim of ineffective assistance of counsel.

Cumulative Error

The appellant also asserts the military judge committed "numerous errors" in both the findings and sentencing phases of the appellant's trial resulting in a cumulative error requiring reversal. In support of this assignment the petitioner claims, amongst other assertions of error, the military judge erred in permitting irrelevant and highly prejudicial testimony from Maj AID on her admission into the "Threatened Airman's Program" and testimony about her daughter's difficulties in school.[10] The appellant also asserts the military judge erred in denying a challenge against a court member, in refusing to permit the ex-husband of Maj AID to testify about her credibility, in admitting photographs without a proper foundation, in denying defense's request to admit the performance reports of the appellant in findings, in admitting admissions of the appellant and in allowing "racism and discrimination to seep into the court-room and into the members minds through the testimony from the witnesses."

It is well-established that this Court can order a rehearing based on the accumulation of errors not reversible individually. This authority is vested in the cumulative-error doctrine. This doctrine requires this Court to consider:

> each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy-or lack of efficacy--of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial.

United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (5th Cir. 1993) (citation omitted)).

In addition, in *Dollente* our superior court noted, when assessing the record under the cumulative-error doctrine, courts "'must review all errors preserved for appeal and all

[10] We note that the appellant fails to mention in this portion of his assignment of errors that the military judge did in fact instruct the members to disregard the testimony on the Threatened Airman's Program.

plain errors.'" *Dollente*, 45 M.J. at 242 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). Courts are far less likely to find cumulative error "[w]here evidentiary errors are followed by curative instructions" or when a record contains overwhelming evidence of a defendant's guilt. *Id.* (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)).

Having reviewed each of the claims of error we first note that we find no error on the part of the military judge as to any of her rulings. Finding no error, we need not address the issue of cumulative error.

Final Matters

We have also considered the appellant's remaining assertions of error. Having considered each of them, we find them to be without merit and not requiring further discussion. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Sentence Reassessment

Because we dismissed Additional Charge I and its Specification, we next analyze the case to determine whether we can reassess the sentence. *See United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). "If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *Id.* at 185 (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We conclude that we can.

The appellant was found guilty of 18 specifications. While we do consider disobedience of orders a significant offense, the dismissed specification was not the most significant by some order of magnitude. It raised the maximum permissible punishment in this case by only 6 months. Reassessing the sentence, we are convinced beyond a reasonable doubt that the panel would have awarded a sentence of at least 7 years and nine months. Furthermore, we find the sentence, as modified, to be appropriate. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Court-Martial Order

The Court-Martial Order in this case has a number of minor technical errors. First, the order improperly reflects original Charge II twice. The second Charge II should be changed to Charge III. Second, the dismissal of Specification 7 of Charge III should reflect that it was "Dismissed on motion from defense for being facially defective." Therefore, we order the promulgation of a corrected Court-Martial Order, consistent with this guidance.

Conclusion

Additional Charge I and its Specification are set aside and hereby dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

Judge BRAND did not participate.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court