UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHARLES S. ROACH
United States Air Force

ACM S31143 (f rev)

24 April 2009

Sentence adjudged 20 June 2006 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Jennifer Whittier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Captain Ryan N. Hoback (argued), Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jefferson E. McBride, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

FRANCIS, JACKSON, and HELGET
Appellate Military Judges

UPON FURTHER REVIEW

FRANCIS, Chief Judge (Designated):

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of willful dereliction of duty on divers occasions and one specification of wrongful use of cocaine, in violation of Articles 92

and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The approved sentence includes a bad-conduct discharge, confinement for three months, and reduction to the grade of E-1.[1]

This case is before this Court for further review. By unpublished *per curiam* decision, issued 13 September 2007, this Court affirmed the approved findings and sentence. *United States v. Roach*, ACM S31143 (A.F. Ct. Crim. App. 13 Sep 2007) (unpub. op.).[2] By decision issued 26 June 2008, the Court of Appeals for the Armed Forces found that we erred in precipitously deciding the case without the benefit of briefs from the appellant's appointed military appellate counsel. *United States v. Roach*, 66 M.J. 410 (C.A.A.F. 2008). As a result, our superior court set aside our decision and returned the case to The Judge Advocate General of the Air Force for remand to this Court "for plenary review with assistance of counsel." *Id.* at 419. The record was thereafter returned to this Court on 21 July 2008. Through briefs filed by his appellate counsel, the appellant subsequently raised eight assignments of error. Finding no prejudicial error, we affirm.

Background

On 13 October 2005, the appellant twice wrongfully used his government travel card to obtain money from automated teller machines, withdrawing $140 the first time and $60 the second time. At the time of the withdrawals, the appellant was not on temporary duty orders and the money he withdrew was not for official government travel or related expenses. Two months prior to the withdrawals, the appellant had been issued a written order to use his government travel card only for official travel and related expenses.[3] After the second withdrawal of funds, the appellant gave $40 to Ms. JC, a known drug user and prostitute, to buy crack cocaine. He and Ms. JC then smoked the cocaine with Airman First Class (A1C) Neff,[4] using a glass tube, or "crack pipe," with steel wool stuffed in one end as a filter.

Assistant Trial Counsel Not Sworn

The appellant asserts that the assistant trial counsel erroneously participated in prosecuting the appellant without having taken the oath required by Article 42(a), UCMJ, 10 U.S.C. § 842(a). We find error, but no prejudice to the appellant.

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[1] The military judge sentenced the appellant to a bad-conduct discharge, four months confinement, and reduction to E-1. A pretrial agreement (PTA) limited the maximum period of confinement to no more than three months.

[2] After release of the initial decision, the Court issued two corrected versions, one to correct a typographical error and one to correct an error in the listing of names of the appellate defense counsel representing the appellant.

[3] The appellant's wrongful use of his government travel card served as the basis for the willful dereliction of duty charge.

[4] Airman First Class (A1C) Neff was separately tried by special court-martial and on 1 June 2006 was convicted of one specification of dereliction of duty and one specification of wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a.

Article 42(a), UCMJ, requires in pertinent part that "[b]efore performing their respective duties . . . trial counsel [and] assistant trial counsel . . . shall take an oath to perform their duties faithfully." At the start of the appellant's trial, the assistant trial counsel announced that all members of the prosecution had been "sworn under Article 42(a)." The Staff Judge Advocate's Recommendation to the convening authority indicated that was not correct, in that the assistant trial counsel had not taken the required oath, but concluded the appellant had not been prejudiced by the error.

Failure to complete the required oath does not constitute a jurisdictional defect or result in "general prejudice" to an accused. Rather, we must examine the error for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Walsh*, 47 C.M.R. 926, 930 (C.M.A. 1973); *United States v. Joslin*, 47 C.M.R. 270, 271 (A.F.C.M.R. 1973). Having done so, we find absolutely no prejudice to this appellant. Nothing in the record indicates the assistant trial counsel did not perform his duties faithfully, even in the absence of the required oath. In reaching this determination, and as further discussed below, we have considered but find without merit the appellant's assertion that the assistant trial counsel made an improper sentencing argument.

Sentencing Argument

The appellant asserts that the assistant trial counsel "[improperly argued] as a factual matter that [the a]ppellant's co-actor had never before smoked crack cocaine when the record contained no evidence establishing that proposition as a factual matter but rather included only a presumptively unreliable statement that [the a]ppellant's co-actor told an [Air Force Office of Special Investigations (AFOSI)] interrogator that he had never before smoked crack cocaine and that [the a]ppellant told him how to do so."[5]

This claim stems from the wording of a stipulation of fact entered into evidence at trial. With regard to the appellant's use of crack cocaine with Ms. JC and A1C Neff, the stipulation contained the following statement: "According to A1C Neff's statement to the Office of Special Investigations, this was the first time A1C Neff had ever smoked crack-cocaine. A1C Neff states that the [appellant] told him how to smoke the crack-pipe. A1C Neff states he would not have found the crack-cocaine but for the directions provided by the [appellant]." Based on that information, the assistant trial counsel, as

[5] The appellant's brief characterizes the alleged improper argument as "prosecutorial misconduct," relying on our superior court's statement in *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996), that "[p]rosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics cannon." *Id.* (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). The appellant has correctly quoted from *Meek*. However, it is clear from the context of that case that true "prosecutorial misconduct" involves a far greater degree of culpability than is even remotely suggested by the facts of this case. Put simply, not every error by counsel merits the label "prosecutorial misconduct." Even assuming, *arguendo*, that this Court were to find that the assistant trial counsel's argument was improper and that the appellant was thereby prejudiced and entitled to relief, there is nothing in the record that would justify deeming such error "prosecutorial misconduct."

part of his sentencing argument, argued that it was A1C Neff's "very first time using crack cocaine, and he would have never had access to it that night except for Airman Roach's involvement in this case." Trial defense counsel made no objection to the argument.

The appellant asserts that the stipulation of fact, by its wording, stipulated only that A1C Neff had made the referenced statement to the AFOSI interrogator, not that the factual assertions in the statements were true. Relying on *Lee v. Illinois*, 476 U.S. 530, 545 (1986), the appellant further argues that given A1C Neff's status as a co-actor with the appellant in using cocaine, his statement is "presumptively unreliable," and the contents of that statement were therefore improperly asserted by the assistant trial counsel as "facts" during his sentencing argument.

Failure to object to improper argument at trial waives the issue on appeal, absent plain error. *United States v. Schroder*, 65 M.J. 49, 57 (C.A.A.F. 2007); *United States v. Haney*, 64 M.J. 101, 105 (C.A.A.F. 2006). Here, we find no error in the assistant trial counsel's argument, plain or otherwise.

Trial counsel are "permitted to comment earnestly and forcefully on the evidence, as well as on any inferences" that may reasonably be drawn from that evidence. *Haney*, 64 M.J. at 104 (quoting *United States v. Doctor*, 21 C.M.R. 252, 259-60 (C.M.A. 1956)). That is exactly what the assistant trial counsel did here. Although the parties did not stipulate to the truth of A1C Neff's statement, the contents of that statement, having been included within the body of a stipulation of fact that was voluntarily entered into by the appellant, were nonetheless part of the evidence before the court. A1C Neff's assertions were therefore fair game for comment by either counsel and subject to proper consideration by the military judge, as well as this Court, in assessing the nature of the appellant's offenses.

The appellant's reliance on *Lee* is misplaced. In *Lee*, the Supreme Court addressed the admissibility of a co-defendant's out of court confession *over the objection of the accused*. *Lee*, 476 U.S. at 544-46. The Court found that such statements were "presumptively unreliable" hearsay, the involuntary admission of which violated the accused's Sixth Amendment[6] right to confront the witnesses against him. *Id.* That is not the case here. Rather, A1C Neff's statement was properly admitted before the court as part of a stipulation of fact voluntarily entered into by the appellant in accordance with the terms of his pretrial agreement.[7] Neither *Lee* nor any other line of cases stands for the proposition that a co-actor's statement, once properly admitted into evidence, is "presumptively unreliable," such that it cannot be considered at all by the trier of fact or sentencing authority. Indeed, our superior court has explicitly recognized that the

[6] U.S. CONST. amend. VI.

[7] As part of his PTA, the appellant committed to "agree with the trial counsel on a reasonable stipulation of fact."

testimony of an accomplice, if not otherwise self-contradictory, uncertain, or improbable, is alone sufficient to support a conviction. *United States v. Williams*, 52 M.J. 218, 222 (C.A.A.F. 2000). We find no contradictions in A1C Neff's statement and it is entirely consistent with the "facts" otherwise specifically stipulated to by the appellant in the remainder of the stipulation of fact.

Notwithstanding the above, the law does recognize that criminal co-actors have an inherent self-interest in painting their own actions in a light most favorable to themselves and that statements of such individuals, when implicating an accused, should therefore be considered with caution. Rule for Courts-Martial (R.C.M.) 918(c), Discussion. Accordingly, military judges are required to issue instructions to that effect and the trial guide used by most military judges includes a standard instruction for that purpose. *United States v. Bigelow*, 57 M.J. 64, 66-68 (C.A.A.F. 2002); Department of the Army Pamphlet 27-9, *Military Judge's Benchbook*, ¶ 7-10 (15 Sep 2002). Of course, because the appellant elected to be tried by military judge alone, no such instruction was ever issued in this case. However, "[a]s the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). Yet we need not rely on that presumption here. The trial defense counsel, in his sentencing argument, specifically called this precept to the attention of the military judge, arguing that A1C Neff had an obvious self-interest in downplaying his own involvement and that his statement should be weighed accordingly. We find nothing in the record to indicate the military judge did not do so.

Providency of Pleas

The appellant asserts that his plea to Charge II and its Specification (willful dereliction of duty) was improvident because the military judge failed to explain to the appellant the potential defense of voluntary intoxication.[8] We find no error.

We review a military judge's decision to accept a guilty plea for abuse of discretion and will not overturn such a decision on appeal unless the record establishes a substantial basis in law or fact for questioning the legitimacy of the plea. *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008); *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008). If the *Care*[9] colloquy raises a potential defense, "the judge must explain [the] defense and reject the pleas if the defense is not negated." *United States v. Winter*, 35 M.J. 93, 94 (C.M.A. 1992) (citing R.C.M. 910(e), Discussion). However, our examination of the record to determine whether the inquiry raised a potential defense is still subject to the same standard, i.e., there must be a "substantial basis" for questioning

[8] The appellant does not otherwise challenge the providency of his pleas, nor do we find any basis for doing so.
[9] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

the validity of the plea. The "mere possibility of [a] conflict" is not sufficient. *Yanger*, 67 M.J. at 57 (citations omitted).

Voluntary intoxication is not a defense, but may "negate the specific intent required for some offenses." *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997) (citing *United States v. Anderson*, 25 M.J. 342 (C.M.A. 1987)); *see* R.C.M. 916(l)(2); *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1997). Willful dereliction of duty is such an offense. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 16.c.(3)(c) (2005 ed.).[10] The potential defense of voluntary intoxication does not arise simply because the appellant was drinking or was even intoxicated. Rather, "[t]here must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent." *Peterson*, 47 M.J. at 233-34 (quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989)).

During the *Care* inquiry, the appellant told the military judge that he had been consuming alcohol prior to his offenses. In response to the military judge's question as to how much he had to drink, the appellant replied that it was "unclear" and further: "I'm not sure of the amount, but on a scale of 1 to 10 of how drunk I was, probably like a 7." The appellant asserts these statements raised the potential defense of voluntary intoxication as to the willful dereliction of duty offenses, thereby triggering a requirement for the military judge to explain that potential defense prior to accepting his guilty plea. The military judge did not.

The quoted statements were made in conjunction with the military judge's inquiry into the nature of the appellant's use of cocaine, an offense which occurred some period of time after the appellant's misuse of his government travel card. The record is not clear as to whether he was equally intoxicated when he committed the earlier offenses. However, even assuming that he was, we find no error by the military judge.

While the quoted statements certainly indicate that the appellant was drinking, and even intoxicated, they do not on their face indicate that he was "incapable of forming the necessary intent." Moreover, the remainder of the *Care* inquiry indicates just the opposite. In response to further questions by the military judge, the appellant indicated that his misuse of the government travel card was not the result of a mistake or accident brought on by his drinking, but that he knew what he was doing, made a conscious choice to use the government travel card, and knowingly and purposefully failed to perform his duty. Considering the totality of the appellant's responses, we find that the evidence did not give rise to the potential defense of voluntary intoxication. Accordingly, there was no requirement for the military judge to specifically discuss that potential defense with the appellant.

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[10] The 2005 edition was in effect at the time of trial. Willful dereliction of duty obviously remains a specific intent crime in the current *Manual*.

Sentence Appropriateness

The appellant asserts that the approved sentence is inappropriately severe for two reasons.[11] First, he argues that there is a substantial disparity between the sentence he received and the sentence of his co-actor, A1C Neff. Second, he argues that the convening authority improperly failed to release the appellant from confinement after the appellant's wife had a miscarriage.[12] We find no merit in either argument.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

In making a sentence appropriateness determination, we are required to examine sentences in closely related cases and permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. An appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *Id.* If both factors exist, the question becomes whether there is a rational basis for the difference in the respective sentences. *Id.*; *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001).

The appellee concedes, and this Court so finds, that A1C Neff and the appellant were "co-actors" for sentence comparison purposes. Both were charged, inter alia, with wrongful use of cocaine arising out of the same transaction. Both were also charged with additional offenses that were committed individually during the same evening, while the two were together.

When comparing sentences of co-actors to determine if they are highly disparate, we look to the sentences adjudged, not approved. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985); *United States v. Phillips*, NMCCA 200300969 (N.M. Ct. Crim. App. 21 Nov 2005) (unpub. op.), *aff'd on other grounds*, 64 M.J. 176 (C.A.A.F. 2006). A1C Neff was sentenced by a panel of officers to 30 days confinement, 90 days hard labor without confinement,

[11] The appellant raised these arguments as two separate assertions of error as to sentence appropriateness. We address both together.

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

forfeiture of $325 pay per month for 6 months, reduction to E-1, and a reprimand. Comparing this to the appellant's adjudged sentence of a bad-conduct discharge, 4 months confinement, and reduction to E-1, the only significant difference is the appellant's receipt of a punitive discharge.[13] While A1C Neff was adjudged only 30 days of confinement in comparison to 4 months for the appellant, that difference is offset by the additional punishments of hard labor without confinement and forfeitures, neither of which applied to the appellant. We accordingly find those portions of the adjudged sentences roughly comparable.

That the appellant received a bad-conduct discharge, when A1C Neff did not, is a different matter. A punitive discharge is itself a significant punishment and, while not universally true, a bad-conduct discharge has at times been deemed roughly equivalent to an additional 12 months confinement. *United States v. Cavalier*, 17 M.J. 573, 577 (A.F.C.M.R. 1983). This Court has previously found that one co-actor's receipt of a punitive discharge, while the other co-actor did not, resulted in "highly disparate" sentences. *United States v. Kent*, 9 M.J. 836, 838 (A.F.C.M.R. 1980). We reach the same conclusion here.

Although we find the appellant's and A1C Neff's sentences highly disparate, it is clear from the record that there is a rational basis for the disparity. First, the offenses of which the appellant was convicted are more serious. Both airmen were convicted of one specification of wrongful use of cocaine and one specification of willful dereliction of duty. However, A1C Neff's dereliction consisted of only underage drinking. In contrast, the appellant, on two occasions, willfully misused his government travel card to withdraw cash for his personal use, unrelated to any approved government travel. Further, he did so less than three months after being issued a written order directing that the card be used only for official travel or related expenses. Moreover, although not explicitly stated at trial, a reasonable inference to be drawn from the sequence of events on the day the appellant misused the card is that he used some of the funds to finance purchase of the cocaine which he and A1C Neff used, along with some of the paraphernalia required to use it.

Second, the appellant was higher in rank than A1C Neff. Although there is not much difference in rank between a senior airman and an airman first class, there is nonetheless a difference. The Air Force places greater responsibility on airmen as they

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[13] When taking action, the convening authority reduced A1C Neff's sentence to 30 days confinement, 35 days hard labor without confinement, forfeiture of $325 pay per month for 2 months, reduction to E-1, and a reprimand. The appellant argues that this reduction made the differences between the respective sentences even more significant. However, as indicated by *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985); and *United States v. Phillips*, NMCCA 200300969 (N.M. Ct. Crim. App. 21 Nov 2005) (unpub. op.), *aff'd on other grounds*, 64 M.J. 176 (C.A.A.F. 2006), we compare the sentences *adjudged*, not the reductions made by the convening authority, whether as a matter of clemency (as in A1C Neff's case) or to comply with the terms of a PTA (as in the appellant's case).

progress to higher rank and expects them to set the example for their juniors. *See* Air Force Instruction (AFI) 36-2618, *The Enlisted Force Structure*, ¶ 3.2 (1 Dec 2004).

Third, the record indicates that the appellant played a pivotal role in A1C Neff's use of cocaine. A stipulation of fact agreed to by the appellant at trial and entered into evidence by the prosecution, details A1C Neff's version of the cocaine offense, as previously related in a statement to the Air Force Office of Special Investigations. A1C Neff indicated that although he drove the car, the appellant told him where to drive to find the cocaine. Further, it was the first time that A1C Neff had ever smoked crack cocaine, and the appellant had to show him how to do it. Finally, A1C Neff only smoked from the pipe once, while the appellant did so a "couple times."[14]

We also find no merit in the appellant's assertion that his sentence is inappropriately severe because the convening authority failed to let him out of confinement after the appellant's wife had a miscarriage. In this regard, we note that the appellant does not allege, nor does the record indicate, that the convening authority was ever notified of the miscarriage. The convening authority obviously could not act on information not brought to her attention.[15] Moreover, even if the matter had been brought to the convening authority's attention, she was not obligated to release the appellant from confinement early. Convening authorities have a great deal of discretion when acting on an adjudged sentence and "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." R.C.M. 1107(d)(1). Further, even after the convening authority has taken action on a sentence adjudged by a special court-martial, she "may suspend or remit" any unexecuted portion of the sentence that does not extend to a bad-conduct discharge. R.C.M. 1108(b). However, the key word in both of these provisions is "may." A convening authority's determination to exercise clemency in any form, including reducing a period of adjudged and approved confinement, is a "'highly discretionary' command function," not a legal requirement. *United States v. Travis*, 66 M.J. 301, 303 (C.A.A.F. 2008) (quoting *United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005)). It therefore follows that a convening authority's failure to exercise clemency, for whatever reason, is not legal error.[16]

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[14] The appellant argues that because the stipulation of fact did not stipulate to the factual accuracy of the substance of A1C Neff's prior statement, his account of what happened is "presumptively unreliable" and so cannot be relied on when assessing whether there is a rational basis for any sentence disparity. As detailed in our analysis of the appellant's assertion of improper sentencing argument, *supra*, the wording of the stipulation relative to A1C Neff's prior statement goes only to the weight to be accorded such statement. We find nothing contradictory to or within A1C Neff's account of that evening's events, as detailed in the stipulation of fact, and find it credible.

[15] Based on clemency submissions from the appellant, including a submission on 7 August 2008, the convening authority was aware that the appellant's wife was pregnant and, because of complications, had been deemed a "high risk" pregnancy. None of those submissions, including that submitted on 7 August 2008, mentioned miscarriage.

[16] The convening authority here, though apparently not informed about the appellant's spouse's miscarriage, did nonetheless exercise some clemency. At the request of the appellant, she waived automatic forfeitures for the benefit of the appellant's family.

Post-Trial Processing

The appellant raises two related post-trial processing assertions of error, which we address together. He asserts that this Court's original opinion, which was set aside and remanded on appeal, was an illicit attempt to "grab power" from the Court of Appeals for the Armed Forces that resulted in unreasonable post-trial delay. As a remedy, he asks that we set aside the adjudged and approved bad-conduct discharge. The appellant also asserts that even if we find no due process violation, the Court should, in light of the prior panel's attempt to "grab power" from our superior court, use its Article 66, UCMJ, 10 U.S.C. § 866, authority to disapprove the bad-conduct discharge. Both asserted errors stem from extrajudicial remarks allegedly made by this Court's chief judge, who was a member of the panel which issued the original decision. We find no merit in either assertion.

In setting aside the original decision, the Court of Appeals for the Armed Forces found that this Court erred by deciding the case without the benefit of submissions from the appellant's assigned legal counsel, in contravention of established precedent, to wit, *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998) and *United States v. Bell*, 11 C.M.A. 306 (C.M.A. 1960). *Roach,* 66 M.J. at 418-19. The original decision of this Court did not address either *May* or *Bell*. *Roach*, ACM S31143 (unpub. op.).

The appellant provided the Court two affidavits in support of his post-trial due process claims. One is from Captain (Capt) TC, a lawyer in the Appellate Defense Division. It indicates that on 10 April 2008, he participated in an Air Force Court of Criminal Appeals outreach argument at Lackland Air Force Base, Texas. During a question and answer period after argument, the chief judge, who was also a member of that panel, briefly discussed a prior case in which this Court had issued a decision without a submission from counsel. According to Capt TC, the chief judge stated that "the Air Force Court decided the case . . . without a submission from counsel as a 'test case' in light of the apparent conflict between [*United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006)] and the other C.A.A.F. case saying courts of criminal appeals could not decide cases without a submission by appellant's counsel." Although the chief judge did not say the name of the case, Capt TC believed he was referring to the Court's original decision in *Roach.*

The second affidavit is from Mr. JW, who served as an intern with the Appellate Defense Division during the summer of 2008. Mr. JW averred that on 9 July 2008, he and other interns attended a question and answer session with the chief judge about the Air Force Court. Mr. JW asserted that during the resulting discussion, the chief judge, referring to the Court's original decision in *Roach*, stated that the Court "attempted to 'grab power' from CAAF," and stated that this Court's opinion "purposefully omitted citation of [*United States*] *v. May*, case law that favored the appellant."

In responding to the appellant's allegations, the government also submitted affidavits from two interns. One is from Ms. ME, who generally recalled attending the intern meeting with the chief judge, and that he discussed *Roach*, but little else. The other, from Mr. CG, provided a more detailed account of the meeting. He confirmed that the chief judge described this Court's original decision as an attempted "power-grab." He also indicated that the chief judge went on to explain "that there were two lines of jurisprudence with regard to the issues in [*Roach*]. One . . . supported the notion that [this Court] had the power to decide the issue, and the other undermined that notion." Mr. CG further stated that the chief judge also "explained that [this Court's] opinion reflected the reasoning in the case law supporting jurisdiction [and] that the Court did not address the other line of case law."

The government also submitted an affidavit from the chief judge.[17] The chief judge recalled the 9 July 2008 meeting with the interns, and the discussion he had with them about *Roach*. He indicated he did not remember the exact words he used when discussing the case, but did remember the concepts he was trying to convey. The first was that this Court is bound by the direction and precedent of the Court of Appeals for the Armed Forces. The second, which he conveyed through a brief discussion of *Moreno*, *May*, and our superior court's decision in *Roach*, was that he believed *Moreno* to be the controlling precedent when his panel issued its decision. In addition to recounting his meeting with the interns, the chief judge also explained in more detail in the affidavit why he believed, at the time of the original panel decision, that *Moreno* provided controlling precedent that allowed the panel to decide *Roach* without the benefit of briefs from counsel. Finally, the chief judge denied that the panel acted in intentional violation of controlling legal precedent.

Two preliminary matters require resolution before we can directly address the appellant's post-trial delay claims. The most significant is whether a formal decision of this Court, issued by a panel of judges established pursuant to Article 66(a), UCMJ, can be impeached by the extrajudicial remarks of a judge who participated in the decision. We hold that it cannot. The Supreme Court long ago held that the judgment of a court "ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision." *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904); *see also Rubens v. Mason*, 387 F.3d 183, 191 (2nd Cir. 2004); *Perkins v. LeCureaux*, 58 F.3d 214, 220 (6th Cir. 1995); *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982); *United States v. Lentz*, 54 M.J. 818, 820 (N.M. Ct. Crim. App.

[17] Based on the nature of the allegations raised by the appellant, and on motion of the appellant, the chief judge recused himself from further participation in this case, effective 25 August 2008. The same day, The Judge Advocate General of the Air Force designated Senior Judge Francis to serve as chief judge for all further case review of the appellant's case. From that date forward, the Court's regularly assigned chief judge exercised no judicial influence over the case. He thereafter executed a post-recusal affidavit addressing the appellant's allegations, not as "chief judge," but as an Air Force colonel. For ease of reference, this opinion will refer to him throughout simply as "the chief judge," unless the discussion merits a different designation.

2001). Although *Fayerweather* and the other cited cases addressed testimony or extrajudicial remarks by a trial judge,[18] the same restriction logically applies to judgments at all levels. That is especially true when, as here, the decision in question was issued not by a single judge, but by a panel of three judges, and thus may not reflect the thought processes of any single judge.

Applying the above precedent, we find that neither the chief judge's extrajudicial remarks, as reported by the various third-party affidavits, nor his own post-recusal affidavit, may be considered for purposes of challenging the panel's decision. Rather, the decision, like all decisions of this or any other court, stands or falls on its own merit, looking only to the four corners of the decision itself. Having done so, we find nothing within this Court's original decision to indicate that it was issued in deliberate violation of higher court precedent.

Assuming, *arguendo,* that the chief judge's extrajudicial comments could be used as a basis to challenge the legitimacy of the original panel's decision, we would nonetheless still find no actionable error. In this regard, we look to the various affidavits submitted by the appellant and the appellee to determine what the chief judge said and its meaning.

Although we have the power to consider post-trial affidavits submitted as part of the appellate process, "Article 66(c) does not authorize a Court of Criminal Appeals to decide disputed questions of material fact pertaining to a post-trial claim, solely or in part on the basis of *conflicting* affidavits submitted by the parties." *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004) (citing *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997)) (emphasis added). Thus, the first question in determining the consideration to be given dueling affidavits is whether they do in fact "conflict" as to disputed questions of material fact. If they do not, we may proceed to resolve the issue on the basis of the affidavits. If they do conflict, we resolve the dispute in accordance with the principles established by our superior court in *Ginn*.

We find no conflict in the affidavits submitted in this case. It is clear from the collective affidavits that the chief judge, during the 9 July 2008 meeting with the interns, described the original decision of this Court in *Roach* as an attempt to "grab power" from the Court of Appeals for the Armed Forces. Both Mr. JW and Mr. CG aver that he did so and the chief judge's post-recusal affidavit does not deny it, indicating that he does not recall the exact words he used that day. For purposes of this appeal, we therefore find as a matter of fact that the "grab power" comment was made. However, the real question is what was meant or intended by the comment, i.e., whether it constituted a literally accurate description of this Court's decision or was simply a colorful way of speaking.

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[18] Our research found no cases addressing the issue within the context of remarks or testimony by an appellate judge.

The appellant takes the "grab power" phrase at face value, and asserts that, when viewed in combination with the lack of reference to *May* or *Bell* in the original decision, evidences a deliberate decision to ignore controlling legal precedent. We find to the contrary.

First, we note that none of the third party affidavits address the intent of the chief judge's remarks or whether the "grab power" comment was a literally accurate description of the Court's decision. Nor could they logically do so. That intent can only be supplied by the speaker and is made clear in this case by the chief judge's post-recusal affidavit. That affidavit specifically indicates that he was attempting to convey to the interns an understanding that he believed this Court's original decision was correct based on our superior court's decision in *Moreno*, but that we are bound by the Court of Appeals for the Armed Forces' decision to the contrary and will follow it. The affidavit also specifically denied any intentional misapplication of the law.

We find the chief judge's explanation to be both reasonable and credible. In making this determination, we have also considered the inherent legal absurdity of any suggestion that this Court could, through one of its decisions, "grab power" from a higher court. This Court can no more "grab power" from the Court of Appeals for the Armed Forces than that Court could "grab power" from the Supreme Court. The very nature of our system of appellate review precludes it. Put simply, higher appellate courts have the last say. The Court of Appeals for the Armed Forces, exercising its power under Article 67, UCMJ, 10 U.S.C. § 867, has authority to review every decision of this Court appealed to it by an appellant. The Court of Appeals for the Armed Forced vigorously exercises that authority and does not hesitate to overturn or set aside any decision of the service courts of criminal appeals which it deems to be wrongly decided, just as it did in this case and no doubt will do again if it finds further error. Clearly the chief judge, given his position, was fully knowledgeable of the appellate system of review under which this Court operates and of the authority exercised by the Court of Appeals for the Armed Forces.[19]

Nor is the appellant's position advanced by Capt TC's recollection that the chief judge described the original decision as a "test case," or by Mr. JW's further statement that the chief judge said the decision "purposefully omitted citation of . . . case law that favored the appellant." As to the former, Capt TC's affidavit also makes clear that the chief judge perceived "an apparent conflict between *Moreno* and [other cases precluding a decision without submissions by counsel]." That comment comports both with Mr.

[19] We would reach the same result even if the affidavits were found to conflict with regard to the "grab power" comment. The fourth principle in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) permits the Court to discount factual assertions when "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts." *Ginn*, 47 M.J. at 248. Such is the case here. The legal absurdity of the notion that this Court could "grab power" from a higher appellate court compellingly demonstrates on its face that the comment was not intended as a literally accurate description of this Court's original decision.

CG's recollection that the chief judge believed there were two conflicting lines of jurisprudence and with the chief judge's post-recusal affidavit concerning his belief that *Moreno* controlled. Given that perceived conflict, the Court was bound to make a decision as to which line of precedent to follow. As to the latter, assuming for the sake of argument that it too was not simply a colorful way of speaking, there is a significant difference between purposefully omitting citation to authority which "favors" a given position and intentionally ignoring controlling legal precedent. Although the appellant is willing to make that vast leap in interpreting the chief judge's comments, we are not. It is certainly appropriate for decisions of this Court to fully address case law which the judges concerned recognize as potentially applicable, even if it is ultimately deemed not to be controlling. However, it is not legally required and failure to do so does not constitute legal error. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987) (holding that there is "no requirement of law that appellate courts in general or a court of military review in particular must articulate its reasoning on every issue raised by counsel.").

We have also considered, but find no merit in the appellant's argument that the original decision of this Court must have been issued in deliberate violation of controlling precedent because "no reasonable judge" could have found that *May* and *Bell* were not controlling. The appellant correctly points out that this Court is required to follow legal precedent established by the Court of Appeals for the Armed Forces. *United States v. Kelly*, 45 M.J. 259, 260 (C.A.A.F. 1996). However, sometimes precedents appear to conflict, and it is not always clear which applies. Given our superior court's decision, it is now evident that, *Moreno* notwithstanding, *May* and *Bell* preclude service courts of criminal appeals from proceeding to final review without the benefit of briefs from assigned appellate counsel, no matter how dilatory, without first affording the appellant opportunities for alternative representation. *Roach*, 66 M.J. at 418-19. However, our superior court's decision in *Roach* does not mean that "no reasonable judge" could have concluded that the Court could, prior to that decision, proceed to final review without the benefit of submissions from counsel. Certainly the two judges who dissented from our superior court's holding in *Roach* believed the Court could do so. *Id.* at 425 (Stuckey, J., and Ryan, J., dissenting). While dissenting opinions are obviously not binding legal precedent, the dissent here does at least suggest that reasonable minds could differ on the issue. We also note that at least one of our sister courts, faced with repeated delays by assigned appellate counsel, determined that it would conduct its review without further submissions if counsel did not file a brief by a specified date. *United States v. Dearing*, 60 M.J. 892, 904 (N.M. Ct. Crim. App. 2005), *rev'd on other grounds*, 65 M.J. 478 (C.A.A.F. 2006). Ultimately, the court in that case never got to that point, because counsel submitted a brief within the imposed deadline. However, the fact that our sister court was considering the very same action taken in the original decision of this Court again suggests that the issue was one over which reasonable minds could differ.

With the above as a backdrop, we examine the appellant's post-trial delay claims, employing the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135-36. None of the factors weigh in favor of the appellant.

With regard to the first factor, the time taken for post-trial processing and review of the appellant's case, from immediate post-trial processing by the convening authority, through initial consideration by this Court, to consideration by this Court after remand, is not unreasonably long. For cases decided after 11 June 2006, *Moreno* established certain presumptive time standards for post-trial and appellate processing. Specifically, it provides that the convening authority's action should be completed within 120 days of trial; the case should be docketed with the applicable service court of criminal appeals within 30 days after action; and a decision should be issued by the service court within 18 months of docketing. *Id.* at 142. For cases which do not meet those standards, we apply a presumption of unreasonable delay, which automatically triggers the *Barker* analysis and satisfies the first prong of the four-part test. *Id.* No such presumption applies here. The appellant's trial was completed 20 June 2006, the convening authority acted on 7 August 2006, and the case was initially docketed with this Court on 16 August 2006, all well within the *Moreno* time standards. Further, the initial decision of the Court was issued on 13 September 2007, also well within the *Moreno* standard. Finally, our superior court's decision setting aside the original decision was issued on 26 June 2008. The case was returned to this Court by The Judge Advocate General of the Air Force less than 30 days later, and this decision is being issued less than 10 months later. Again, all well within the established *Moreno* standards and not otherwise unreasonable.

In reaching this determination, we specifically reject the appellant's argument that because this Court's original decision was "legally erroneous," the *Moreno* clock continued to run during the subsequent successful appeal, resulting in a total appellate review time that exceeded the *Moreno* standards and was thus presumptively unreasonable. In support of this argument, the appellant notes that *Moreno* held that the presumption of unreasonable delay applies when "appellate review is not completed" within the specified 18-month period. The appellant reasons that because his case was remanded for further review, appellate review is "not completed" and the clock therefore continued to run throughout the intervening time frame. We do not agree.

The appellant correctly quotes the language at issue. However, the intent and effect of the quoted language can only be determined by reference to the issues pending before the Court in that case. The *Moreno* Court was addressing post-trial processing delays and appellate processing delays during the initial review of that case by the service court of appeal. *Id.* at 136-37. It did not address the time needed for subsequent appeals to the Court of Appeals for the Armed Forces or higher, and it did not mandate that all such intervening appeal time be aggregated for cases returned for further review because

of a successful appeal. Indeed, such a rule would be completely unworkable, in that virtually every case in which an appeal was successful, and was as a result returned for further review, would exceed the *Moreno* standards and trigger a *Barker* analysis. The resulting "do loop" of repetitive appeals, as successful appellants pursued additional assertions of appellate due process violation claims on remand, would quickly turn the appellate system into a quagmire. That cannot have been the intended result of *Moreno*. Rather, the better interpretation is that the *Moreno* clock starts anew upon remand. As previously indicated, the decision here rendered is issued well within the established 18-month standard and so does not trigger the *Moreno* presumptions.

The second factor weighs against the appellant, in that a large portion of the delay between initial docketing with the Court and the Court's initial decision in September 2007 was the result of repeated defense delay requests. Indeed, it was those repeated defense delays that led the Court to complete its review without submissions from counsel in the first place. In this regard, we have considered but find no merit in the appellant's assertion that the government should be accountable for the defense delay period because the defense was undermanned and overworked. In support of this argument, the appellant points to a Background Paper on Appellate Defense Manning that details the division manning and workload.[20] The appellant asserts that the workload documented in that background paper evidences a "systemic breakdown in the Air Force's appellate defense system" such that, under *Vermont v. Brillon*, 129 S.Ct. 1283 (2009), the delay must be attributed to the government. We do not agree.

Statistical data is subject to many differing interpretations and the appellant's counsel have done a good job of drawing from the data presented the arguments that best support their client's position. Nonetheless, we find different meaning in the same information, particularly when considered in light of the entire record. Certainly the background paper makes clear that attorneys in the Appellate Defense Division maintained a significant workload. However, heavy workload alone is not enough to shift accountability for the delays from the appellant to the government. The Supreme Court's recitation of the underlying facts in *Brillon* indicates that part of the basis for the defense delays in that case was "heavy case load." *Brillon*, 129 S.Ct. at 1288. The Supreme Court, by its holding, effectively rejected the notion that heavy workload alone provides a sufficient basis for attributing defense delays to the government. Rather, there must be a "systemic 'breakdown in the public defender system.'" *Id.* at 1292 (quoting *State v. Brillon*, 955 A.2d 1108, 1111 (Vt. 2008)). Several factors militate against the appellant's assertion that such a "systemic breakdown" contributed to delays in the appellant's representation.

[20] The paper was prepared in November 2006 and updated in January 2007. It was incorporated by reference into two defense delay requests when the case was originally pending before this Court and was subsequently offered by the appellant, and accepted by the Court, for consideration in connection with the current appeal.

First, we note that the background paper at issue, which was last updated in January 2007, reflects workload for only eleven attorneys, including two reservists. Based on an office roster submitted to the Court by the appellee, it is evident that even at that time, at least two additional active duty attorneys were available in the division to assist with the workload, including Lieutenant Colonel (Lt Col) MS, an attorney representing the appellant during his initial appeal before this Court and for whom the background paper reflects no additional client caseload.[21] The roster also indicates that the division, beyond the two reserve attorneys counted in the background paper, also had seven other assigned reserve attorneys. Reservists are a valuable force multiplier and must be taken into account when considering resources available to handle workload. Finally, we note that the Court's original decision was not issued until September 2007, more than eight months after the date of the revised background paper. The roster indicates that as of the end of August 2007, the division had twelve full time attorneys and nine assigned reservists.[22] We find nothing in the record to indicate that all could not have assisted with the office workload.

Second, while the appellant emphasizes the number of clients assigned to the attorneys named in the background paper, client load is only part of the equation in determining overall workload. Complexity of cases is also an important factor, with some cases requiring less time to complete than others. Merits cases traditionally fall into the former category. The background paper indicates that a significant portion of the division workload resulted in merits submissions. For example, it indicates that in fiscal year 2006, while division attorneys submitted a record 638 briefs to this Court, fully 421 of those were merits submissions. During the same period, of 371 briefs submitted to our superior court, 162 were merits submissions.

Third, while the background paper indicates that one of the appellant's assigned attorneys, Capt GD, carried a significant total client load, successive delay requests submitted by the same attorney provide significant insight into the nature of the resulting workload. His delay request submitted on 15 February 2007 indicated that he had 20 cases pending review that had been docketed before the appellant's case. By the time of the next delay request submitted on 12 March 2007, that number had dropped to 10, and by 23 August 2007, had been further cut to 4 cases. That relatively rapid decline in the number of cases in line ahead of the appellant's suggests the workload was well within the capability of the assigned attorney. Moreover, Capt GD was not the only attorney assigned to the appellant's case. As noted above, Lt Col MS also represented the appellant during the time the case was initially pending before this Court. Further, a reserve attorney, Colonel SM, was also assigned to the case for some portion of the

[21] The other active duty attorney in the division not reflected is Colonel (Col) H, who now serves as one of the appellant's counsel.

[22] Two more full time attorneys were assigned in September 2007 and two more reservists were assigned in November 2007.

time.[23] The very ability of the division to assign three attorneys to the case suggests that total office workload was not as overwhelming as the appellant would have the Court believe.

Finally, we note, as did the appellant in the briefs submitted to this Court, that at the time the original decision of the Court was issued, the case was still well within the presumptive time standards established by *Moreno*. That continued to be true when the appellate defense counsel submitted the appellant's initial petition to the Court of Appeals for the Armed Forces just five days later and when they submitted an extensive supplemental brief to that Court on 27 October 2007. The ability of the division to respond so quickly also suggests that the overall workload was not overwhelming.

Considering all of the above, while the defense workload was certainly significant, the record does not support the appellant's assertion that there was a "systemic breakdown" in the ability of the Appellate Defense Division to provide timely legal representation. Accordingly, the delays requested by the defense, and granted by the Court, remain attributable to the defense.

The third factor is neutral, in that the appellant, before raising the issue as part of the current appeal, at no time asserted his right to a timely review and appeal.[24] In fact, even after the current appeal was pending, the appellant submitted a request for, and was granted, a delay of five days to submit matters to the Court on a pending issue. While the resulting delay was small, it was still a delay at the request of the appellant.

In reaching this determination, we find no merit in the appellant's contention that he *did* previously assert his right to a timely review and appeal. In this regard, the appellant draws the Court's attention to the requests for delay submitted by the appellant on 15 February 2007 and 12 March 2007, both for periods of 30 days. Although both requests were granted, the appellant also requested "alternative relief" in each, indicating that if this Court found that the requested delays would result in unreasonable appellate delay, it should exercise the options outlined by our superior court in *Moreno* to grant the appellant sentence relief.

We attach no significance to such obvious tongue-in-cheek requests for relief. Indeed, we believe that it was recognition of the potential for this type of double-edged delay request that led the Supreme Court to observe that "defendants may have incentives to employ delay as a 'defense tactic.'" *Brillon*, 129 S.Ct. at 1290 (quoting *Barker*, 407

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[23]Because of the timing of this Court's original decision, it appears that Col SM, although assigned to the case, did not have the opportunity to enter into a formal attorney-client relationship with the appellant before the Court's decision was issued.

[24] Appellants are not required to affirmatively assert their right to timely review and appeal as a condition of asserting a post-trial due process violation. However, whether they have done so is a consideration when weighing the factors in *Barker v. Wingo*, 407 U.S. 514 (1972). *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006).

U.S. at 521). Those incentives are amplified in the military appellate system, where appellants continue to receive significant benefits while their appeals remain pending, including medical care, commissary and exchange privileges, and continued use of other military facilities. *See* AFI 31-205, *The Air Force Corrections System*, ¶ 5.14.4 (17 Apr 2004); AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, ¶ 9.4.1 and Table 9.4 (20 Dec 2001); AFI 51-201, *Administration of Military Justice*, Figure 9.12 (21 Dec 2007). Given the pregnancy complications suffered by the appellant's spouse at the time he entered post-trial confinement, it is reasonable to infer that his family's continued receipt of medical benefits during the time his appeal is pending is a consideration in determining how, and how quickly, to press that appeal.

The fourth factor weighs against the appellant. The appellant asserts no prejudice from the delays in appellate review of his case, nor does the record reflect any prejudice.

Weighing all of the above factors, we find no due process violation in the post-trial processing and appellate review of the appellant's court-martial. We recognize that we have the power, under Article 66, UCMJ, to grant relief even in the absence of such a violation or in the absence of prejudice. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). However, such action is not warranted here, and we decline to do so.

Cumulative Error

The appellant asserts that even if no single error in his trial or the post-trial processing of his case requires relief, the cumulative effect of those errors does warrant relief.

It is well established that appellate courts may set aside the findings or sentence based on an accumulation of errors that do not individually warrant relief. *United States v. Dollente*, 45 M.J. 234 (C.A.A.F. 1996). "[W]hen assessing the record under the cumulative-error doctrine, [we] 'must review all errors preserved for appeal and all plain errors.'" *Id.* at 242 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). We consider each error within the context of the entire case, with particular attention paid to "the nature and number of errors committed; their interrelationship, if any, and combined effect." *Id.* (quoting *United States v. Sepulveda*, 15 F. 3d 1161, 1196 (1st Cir. 1993)). However, "[t]he implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence. . . . Assertions of error without merit are not sufficient to invoke this doctrine." *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999) (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (CMA 1992)) (alterations in original).

We find no basis for relief under the cumulative-error doctrine. The appellant's assertions of error are, with one exception, without merit. Further, the one error noted, i.e., the fact that the assistant trial counsel was not sworn in accordance with Article 42(a), UCMJ, resulted in no prejudice to the appellant.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court