

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**WILLIAM C. FAIRLEY  
AVIATION MACHINIST'S MATE PETTY OFFICER  
SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200900574  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 28 July 2009.

**Military Judge:** CDR Mario DeOliveira, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southeast,  
Jacksonville, FL.

**Staff Judge Advocate's Recommendation:** CDR F.J. Yuzon,  
JAGC, USN (2 Oct 2009; 15 Oct 2009); CDR M.C. Holifield,  
JAGC, USN (6 Aug 2010; 27 Sep 2010).

**For Appellant:** LT Ryan Santicola, JAGC, USN.

**For Appellee:** LCDR Sergio Sarkany, JAGC, USN.

**17 May 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of aggravated sexual assault, and one specification each of abusive sexual contact and adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The military judge sentenced the appellant to confinement for a period of 9 years, reduction to pay grade E-1, and a dishonorable discharge.

This case is before us for a second time after we set aside the original convening authority's action and returned the record of trial to the Judge Advocate General of the Navy for new post-trial processing consistent with our opinion. *United States v. Fairley*, No. 200900574, 2010 CCA Lexis 75, \*10-11 (N.M.Ct.Crim. App. 30 Jun 2010). In his new action, the CA approved the sentence as adjudged, but suspended all confinement in excess of 8 years and 6 months.

The appellant now raises, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the following assignments of error: (1) that his good time credit is being calculated incorrectly; (2) that his conviction for adultery is unjust; and, (3) that he was denied his Sixth Amendment right to confrontation.

We have carefully examined the record of trial and the pleadings of the parties and conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

#### **Improper Calculation of Good Time Credit**

The appellant maintains that his good time credit should be calculated at a rate of 8 days per month vice 5 days per month. This court's statutory jurisdiction is to review the findings and sentence in certain courts-martial, but like the Court of Appeals for the Armed Forces, we do not have the authority "to oversee all matters arguably related to military justice or to act as a plenary administrator even of criminal judgments it has affirmed." *Clinton v. Goldsmith* 526 U.S. 529, 536 (1999); see Art. 66, UCMJ, 10 U.S.C. § 866. Calculation of the appellant's sentence under proper service regulations is an administrative matter that generally does not constitute punishment and enter our jurisdictional domain. See *United States v. Pena*, 64 M.J. 259, 268 (C.A.A.F. 2007). Accordingly, we will not further address this issue.

#### **Selective Prosecution**

The appellant appears to be claiming, for the first time on appeal, that he was the victim of a selective prosecution because he was prosecuted for adultery while another service member was not. Such an attack can be characterized as an objection to a defect in the preferral and referral process. See *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993). An accused is required to raise any such objection before entering pleas at trial. RULE FOR COURTS-MARTIAL 905(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Failure to make such a motion constitutes waiver. R.C.M. 905(e).

Even if we did not apply waiver, we find that the appellant has not carried his burden with respect to the claim of selective

prosecution because he failed to establish that the victim of the Article 120 offenses also had committed adultery. The appellant cites to an isolated exchange during the cross-examination of Yeoman Third Class [Y], in which the witness mentions that the victim was married and had a boyfriend as evidence of her adultery. See Record at 473-74. The exchange permits or supports no such inference of adultery. Because the appellant has not made a prima facie showing of adultery, we need not consider whether he was unfairly singled out for prosecution.

### **Right to Confrontation**

In his final assignment of error, the appellant maintains that his Sixth Amendment right to confront the victim during the sentencing phase of his court-martial was denied when the military judge entered her video-taped statement, Prosecution Exhibit 5, into evidence. The appellant's assigned error is without merit.

The appellant's pretrial agreement waived any objections to evidence based on the Confrontation Clause and specifically listed PE 5 as evidence to which he waived objection. Appellate Exhibit V at 8. There is thus no error in this respect. See *United States v. Gladue*, 67 M.J. 311, 313-14 (C.A.A.F. 2009).

### **Conclusion**

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court