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

**BEFORE**

**C.L. CARVER** **D.O. VOLLENWEIDER** **E.E. GEISER**

**UNITED STATES**

**v.**

**Jason A. FORREST**
**Corporal (E-4), U. S. Marine Corps**

NMCCA 200000133 Decided 13 March 2006

Sentence adjudged 18 July 1998. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, Marine Forces Pacific, MCAS El Toro, Santa Ana, CA.

LT BRIAN L. MIZER, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel



GEISER, Judge:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a general court-martial, of making a false official statement and unpremeditated murder in violation of Articles 107 and 118, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 918. On 18 July 1998, the appellant was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

On 23 December 1999, the convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, he suspended confinement in excess of 40 years for the period of confinement served plus 6 months. He also suspended the adjudged forfeiture of all pay and allowances and deferred and waived automatic forfeitures for a period of 6 months from the date of the action, in favor of the appellant's son.

## Appellate History

This case is before us for a third time. We originally affirmed the findings and the sentence in an unpublished decision on 19 December 2002. *United States v. Forrest*, No. 200000133, unpublished op. (N.M.Ct.Crim.App. 19 Dec. 2002). On 21 January 2003, the appellant filed a motion to reconsider, along with a supplemental brief and assignment of errors. The brief raised eight errors that had not been addressed in the appellant's original 25 April 2002 brief. On 28 January 2003, this court granted the motion in part, agreeing to reconsider its original decision based on Supplemental Assignments of Error VI, VII, and VIII. Court Order of 28 Jan 2003. In that order, we also found the appellant's five other supplemental assignments of error were without merit. *Id*.

On 27 May 2003, this court found that the appellant's two trial defense counsel failed to provide him, in a timely manner, with a copy of the record of trial and the staff judge advocate's recommendation (SJAR), or otherwise involve the appellant meaningfully in the submission of clemency materials to the convening authority prior to the convening authority taking his action. Having found that these failures worked to the appellant's prejudice, we set aside the convening authority's action of 23 December 1999 and returned the record of trial to the Judge Advocate General of the Navy for remand to an appropriate convening authority to prepare a new convening authority's action. Following completion of these actions, we directed that the record be returned to this court for further review pursuant to Article 66(c), UCMJ. *United States v. Forrest*, No. 200000133, unpublished op. (N.M.Ct.Crim.App. 27 May 2003). On 25 June 2004, the convening authority executed a new action.

On 13 September 2004, the record of trial was again docketed with this court. On 3 December 2004, the appellant filed a motion requesting that we "compel the Government to produce proof that [the a]ppellant's son received the bargained for suspended forfeitures" and that we "order the production of documentation" as to the location of certain personal property alleged to belong to the appellant. Motion to Compel of 3 Dec 2004. On 17 December 2004, this court denied the aforesaid motion noting that the appellant had failed to exhaust his administrative remedies. Court Order of 17 Dec 2004. On 8 April 2005, the appellant briefed 6 new assignments of error to this court. On 11 October 2005, we received the Government's response.

In his 6 new assignments of error, the appellant alleges that (1) this court's 19 December 2002 opinion replicated substantial portions of the Government's answer brief such that the appellant did not receive an independent and complete review under Article 66(c), UCMJ; (2) the staff judge advocate erred by failing to prepare a new SJAR when the appellant's case was remanded for a new CA's action; (3) the substitute defense

counsel was not served with the original SJAR; (4) the appellant's pretrial agreement is invalid because there is no evidence that the appellant's waived forfeitures were received by his son; (5) the appellant was denied due process in that, after the passage of 2438 days, he has still not obtained direct review of his court-martial under Article 66, UCMJ; and (6) the appellant was denied due process through ineffective post-trial assistance of counsel in connection with the 25 June 2004 convening authority's action. Appellant's Brief of 8 Apr 05. The appellant requests that this court reassess and disapprove confinement over 15 years.

On 9 January 2006, this court ordered the Government to produce an affidavit from the substitute defense counsel stating whether or not the original 8 November 1999 SJAR was included in the record of trial he received on or about 14 October 2003. On 13 February 2006, the Government provided the ordered affidavit, which confirmed receipt of the SJAR. Although not raised as an assignment of error, we note that the 25 June 2004 convening authority's action fails to suspend the adjudged forfeiture of all pay and allowances as required under the pretrial agreement. This is a significant omission that we will correct in our decretal paragraph.

We have examined the record of trial, the appellant's assignments of error, and the Government's responses. We conclude that the findings and sentence are correct in law and fact and, except as noted above, no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

**Inadequate Post-Trial Review**

Citing to *United States v. Jenkins*, 60 M.J. 27 (C.M.A. 2004), the appellant asserts that this court's 19 December 2002 opinion replicated substantial portions of the Government's answer brief such that the appellant did not receive an independent and complete review under Article 66(c), UCMJ. The Government interposes no objection to the appellant's request that this court conduct a *de novo* review of the issues raised in the appellant's 25 April 2002 brief.

Given the Government's acquiescence, we will begin by addressing the appellant's three 25 April 2002 assignments of error asserting that (1) his guilty plea to unpremeditated murder was improvident; (2) the military judge abused his discretion by admitting graphic autopsy photos that should have been excluded as their probative value was substantially outweighed by their prejudicial effect; and (3) a sentence including confinement for life was inappropriately severe given the circumstances surrounding the death of his wife as well as his exemplary military character. The panel reviewing these assignments of error is comprised of judges who have not previously participated in this case. Following our analysis of the three 25 April 2002

assignments of error reflected above, we will address the appellant's remaining 8 April 2005 assignments of error.

**Improvident Plea to Unpremeditated Murder**

The appellant asserts that his responses during the providence inquiry into his guilty plea to the murder charge were sufficient to support a finding of guilt to voluntary manslaughter but not to unpremeditated murder. He bases his argument on the fact that the killing was done "in the heat of passion" following the victim's revelation that she had been having an affair. Appellant's Brief of 25 Apr 2002 at 10.

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)).

The appellant "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Discussion. Acceptance of a guilty plea requires the appellant to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e). A military judge has wide discretion in determining whether there is a factual basis for the plea. *United States v. Roane,* 43 M.J. 93, 94-95 (C.A.A.F. 1995). When raised on appeal, the evidence must be viewed in the light most favorable to the prosecution. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, J., concurring).

In this case, the military judge accurately advised the appellant of the elements of the charge of unpremeditated murder to which the appellant was pleading guilty. During the providence inquiry, the appellant asserted that the victim had informed him "minutes before" the murder that she had an affair while he was away on deployment. Record at 39. The military judge explained the concept of adequate provocation contained in MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 44c (1)(b), and inquired of the appellant why he believed he was "guilty of this offense rather than a lesser included offense or no offense at all?" Record at 40.

After consulting with counsel, the appellant responded that he didn't believe there was adequate provocation. He described telephoning his wife while still on deployment and expressly asking her if she was having an affair. While the appellant

averred that the victim didn't answer one way or the other, he told the military judge "a reasonable person could have inferred ... that an affair was going on." While he said that he "refused to believe it," he nonetheless acknowledged to the military judge that he had concerns about his marriage from that point. He further agreed that while he was surprised and shocked to some degree by the victim's admission of infidelity just before the murder, it was not out of the blue. Record at 40-41.

Considering the appellant's admissions during the providence inquiry, we conclude that the victim's formal acknowledgement of her infidelity shortly before the murder was not sufficient provocation to excite uncontrollable passion in a reasonable person in light of the appellant's prior knowledge or at least strong suspicion of the fact. Sufficient cooling time transpired between the deployment telephone call initially raising the matter and the murder. We, therefore, find beyond a reasonable doubt that there is sufficient evidence to support the appellant's plea of guilty to unpremeditated murder and that his culpability is not lessened by the heat of a sudden passion.

**Admission of Graphic Autopsy Photographs**

The appellant argues that the military judge erred by admitting the graphic autopsy photographs contained in Prosecution Exhibit 4. As the appellant did not object at trial, the issue is waived absent "plain error." *United States v. Gilley,* 56 M.J. 113, 122 (C.A.A.F. 2001). Thus, the appellant must demonstrate that there was an error, that it was plain and obvious, and that such error materially prejudiced his substantial rights. *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999).

While not arguing the relevance of the photographs, the appellant describes the graphic nature of photographs eleven through eighteen and argues generally that the photographs were cumulative and "more likely to inflame the sentencer than assist in ascertaining an appropriate sentence." Appellant's Brief of 25 Apr 2002 at 22. The appellant goes on to argue that prejudice is evident from the fact that he received the "maximum allowable punishment." *Id*.

The 26 photographs comprising Prosecution Exhibit 4 were admitted during the presentencing phase of the trial. Each photograph depicts a different aspect of the injuries sustained by the victim and helped clarify different portions of an expert witness' testimony. They are therefore relevant and not cumulative.

While prejudicial impact is a potential concern, we note that this was a military judge alone trial. A military judge is presumed to know the law and is unlikely to be improperly swayed by graphic evidence. *United States v. Prevatte,* 40 M.J. 396, 398 (C.M.A. 1994). We also note that the trial counsel made only

passing references to the photographs in argument. Even assuming *arguendo* that the military judge erred in admitting the photographs, we find no evidence that the military judge was improperly swayed in this instance and therefore find no prejudice to a substantial right of the appellant.

**Sentence Appropriateness**

The appellant argues that a sentence including life imprisonment is inappropriately severe given the extenuating circumstance that the victim asked the appellant to move out of the house and acknowledged her infidelity while he was away on deployment. The appellant further argues that his alcohol consumption should be considered. We have considered these factors, his excellent military record, and the entire record of trial. We have also considered the seriousness of his offenses.

While the victim might have treated the appellant badly, the appellant was not legally entitled to inflict the punishment he elected to visit upon her. He not only took his wife's life but did so in a particularly brutal and vicious manner. The appellant admitted straddling the victim and using his greatly superior strength to repeatedly pound her face as hard as he could. She was in fact unable to defend herself. His attack was carried out with such brutality and ferocity that the victim's blood literally flew on to every wall in every corner of the room.

After the murder, the appellant spent the next few days vigorously trying to hide his crime and to play the victim. He unceremoniously dumped his wife's body in a shallow grave in a remote area, hosed out his truck to hide the evidence and methodically spun a self-serving story to his friends, the victim's friends, and the victim's own relatives. The appellant's crime, his apparent callousness, and his methodical effort not only to hide his crime but also to garner sympathy as the wronged husband was truly staggering. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

**Invalid Pretrial Agreement**

The appellant asserts that his pretrial agreement is invalid because there is no evidence that his son received the appellant's waived forfeitures. While the 25 June 2004 convening authority's action did, in fact, deprive the appellant of the benefit of his bargain in this regard, the original 23 December 1999 convening authority's action properly effected the bargain regarding forfeitures. The action in our decretal paragraph will resolve the inconsistency between the 25 June 2004 convening authority's action and the pretrial agreement. With respect to the appellant's assignment of error, our 17 December 2004 order

remains on point. In that order, we denied the appellant's motion to compel the Government to provide evidence that the waived monies were, in fact, paid to the appellant's son. This court noted that the appellant failed to exhaust his administrative remedies. Such remains the case.

**Failure to Prepare a New SJAR or Serve the 8 November 1999 SJAR on the Substitute Defense Counsel.**

The appellant asserts that the staff judge advocate erred when he failed to prepare a new SJAR in connection with the convening authority's 25 November 2004 action. We disagree. The appellant offers no legal basis for his assertion that the staff judge advocate was somehow required to supplant the existing 8 November 1999 SJAR with a completely new SJAR. Our 27 May 2003 remand of this case for a new convening authority's action was based entirely on deficiencies in the performance of the trial defense counsel and not on any perceived deficiencies with the 8 November 1999 SJAR. We also note that the staff judge advocate did produce an addendum to the SJAR on 24 May 2004 specifically addressing the appellant's clemency request. There were no new matters in this addendum, which simply recommended approving the appellant's clemency request. The convening authority did so in his 25 November 2004 action. With respect to service of the original 8 November 1999 SJAR on the substitute defense counsel, we note that the substitute defense counsel's 9 February 2006 affidavit confirms his receipt of the relevant SJAR. We, therefore, decline to provide relief for either of these assignments of error.

**Post-Trial Processing Delay**

In the instant case, there was a delay of about 2438 days from the date of trial to the date the appellant filed his most recent assignments of error. The appellant contends, and the Government agrees, that over 900 days of delay are attributable to the convening authority. We find this delay to be facially unreasonable. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005). Such substantial delay triggers a due process review. In conducting such a review, we consider and balance four factors in determining if post-trial delay violates the appellant’s due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to a timely appeal; and, (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)).

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. The Government argues that the most significant period of delay is attributable to the appellate defense counsel who took 798 days on initial review and 112 days on remand. We also note that significant portions of the delay are substantially related to the complexity and breadth

of the issues raised in the appellant's case. With respect to the third factor, we find no evidence that the appellant asserted his right to timely post-trial review any time prior to filing his 8 April 2005 appellate brief. Finally, regarding the fourth factor, the appellant argues that he has served 2438 days of his approved sentence to 30 years confinement. He further asserts that the post-trial processing delay has prejudiced him given his "likelihood of success on direct appeal." Appellant's Brief of 8 Apr 2005 at 19. We find this assertion of prejudice speculative at best. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 60 M.J. at 103; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F 2002).

**Ineffective Assistance of Substitute Defense Counsel**

Finally, the appellant asserts that his substitute trial defense counsel was ineffective when he failed to forward "sixty-six pages of material" provided by the appellant for consideration in connection with the 25 June 2004 convening authority action. Appellant's Declaration of 27 Feb 2005; Appellant's Brief of 8 Apr 2005 at 21. In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id*. at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id*.; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F 1997).

As evidence in support of this assignment of error, the appellant provided a thirty-two page handwritten brief raising assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We note that the issues raised in the appellant's 32-page *Grostefon* submission were incorporated in his appellate defense counsel's brief of 21 January 2003, which served as the basis of this court's 28 January 2003 decision granting the appellant's motion for reconsideration. The appellant provides no evidence regarding the remainder of the "sixty-six" pages he asserts were provided to his counsel.

The appellant's substitute defense counsel, in an affidavit dated 5 October 2005, contests the appellant's version of events. Specifically, he asserts that he spoke with the appellant on no less than three occasions to explain his rights and receive matters the appellant desired to submit. Counsel asserts that he received 105 pages of material from the appellant, including a personal statement. He subsequently spoke with the appellant regarding the materials he would submit and the nature of the clemency he would request on the appellant's behalf. According to the substitute defense counsel's affidavit, it was agreed that the clemency request would ask for suspension of all confinement in excess of 30 years. Counsel asserts that the appellant specifically agreed that this was acceptable. Affidavit of Detailed Defense Counsel of 5 Oct 2005 at 2.

We find the substitute defense counsel's affidavit persuasive in light of the inconsistencies and omissions evident in the appellant's affidavit.[1] We also note that the convening authority, in fact, granted the clemency requested in the substitute defense counsel's submission by significantly reducing the appellant's confinement from 40 to 30 years. We conclude, therefore, that the appellant has demonstrated neither deficient performance by his substitute trial defense counsel nor prejudice.

**Conclusion**

The approved findings and the sentence are affirmed. The supplemental court-martial order should reflect that the adjudged forfeitures were suspended for a period of six months from the date of the convening authority's action in accordance with the terms of the pretrial agreement.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court

[1] "A hearing need not be ordered where all the evidence before the factfinder compellingly demonstrates an accuracy of recollection by one as opposed to the other." *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997).