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

**BEFORE**

**Charles Wm. DORMAN** **C.L. CARVER** **J.D. HARTY**

**UNITED STATES**

**v.**

**Whitman D. WALLACE**
**Sergeant (E-5), U. S. Marine Corps**

NMCCA 200001148 Decided 13 January 2006

Sentence adjudged 24 September 1999. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Maj CHARLES HALE, USMC, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel



HARTY, Judge:

In a published decision, a predecessor panel of this court reviewed the appellant's general court-martial and affirmed the findings and sentence as approved by the convening authority (CA). *United States v. Wallace*, 58 M.J. 759 (N.M.Ct.Crim.App. 2003). After granting the appellant's petition for review, our superior court summarily set aside our earlier decision pursuant to *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), and returned the record of trial to this court for further review by a panel of different judges. We have now complied with our superior court's mandate. *United States v. Wallace*, 60 M.J. 348 (C.A.A.F. 2004)(summary disposition).

The appellant was tried by a general court-martial composed of a military judge alone. Pursuant to his pleas, the appellant was found guilty of murder without premeditation, kidnapping, and obstruction of justice, in violation of Articles 118(2) and 134,

Uniform Code of Military Justice, 10 U.S.C. §§ 918(2) and 934. The appellant was sentenced to confinement for life without eligibility for parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. On 11 July 2000, the CA approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 30 years for the period of confinement to be served plus 12 months thereafter.

We have carefully considered the record of trial, the appellant's six assignments of error and three summary assignments of error,[1] and the Government's answer. We find merit in the appellant's summary assignment of error concerning his confinement suspension and will order corrective action in our decretal paragraph. We, otherwise, find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

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[1] I. BECAUSE LIFE WITHOUT PAROLE WAS NOT AN AUTHORIZED PUNISHMENT UNDER THE CODE FOR THE CHARGED OFFENSES AND SENTENCE UPON WHICH IT WAS BASED SHOULD BE SET ASIDE.

II. APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE

III. APPELLANT WAS DENIED ACCESS TO LAW LIBRARY DURING HIS INCARCERATION AT THE CAMP LEJEUNE BRIG.

IV. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CALL MILITARY WITNESSES DURING SENTENCING.

V. IMPROPER ARGUMENT DURING THE TRIAL COUNSEL'S SENTENCING ARGUMENT AMOUNTED TO PLAIN ERROR.

VI. A SUSPENSION PERIOD FOR THE PERIOD OF CONFINEMENT AND ONE YEAR FROM THE DATE OF RELEASE VIOLATES PUBLIC POLICY.

VII. THE SJAR AND THE CONVENING AUTHORITY'S ACTION MISTATE THE AGREED UPON SENTENCE LIMITATION AND THE CONVENING AUTHORITY APPROVED THE WRONG SENTENCE. (First summary Assignment of error).

VIII. THE CONVENING AUTHORITY'S 290 DAY DELAY FROM THE DATE OF TRIAL TO COMPLETE HIS ACTION IS UNREASONABLE AND EXCESSIVE POST TRIAL DELAY THAT VIOLATES THE APPELLANT'S RIGHTS. (Second summary assignment of error).

IX. KIDNAPPING AND MURDER RESULTING FROM THE SAME CONTINUOUS COURSE [OF] CONDUCT IS AN UNREASONABLE MULTIPLICATION OF CHARGES. (Third summary assignment of error).

## Life Without Eligibility for Parole

For his first assignment of error, the appellant asserts that a life sentence without eligibility for parole (LWOP) was not an authorized sentence at the time of his court-martial in September 1999. The essence of the appellant's argument is that while the National Defense Authorization Act of 1997 added life without eligibility for parole as an authorized punishment, the President did not amend the Rules for Court Martial to implement this change until April of 2002. Appellant's Brief of 1 Jul 2002 at 4. We disagree. While this was an unsettled point of military law at the time of this court's original opinion in 2003, our superior court has since addressed this issue.

In *United States v. Ronghi*, 60 M.J. 83, 86 (C.A.A.F. 2004) our superior court determined that Congress intended LWOP to be an authorized punishment for any violation of Article 118(1), UCMJ (premeditated murder), committed after 18 November 1997. The court further found that Article 56a, UCMJ, authorizes LWOP to be imposed for any offense for which a sentence of confinement for life may be adjudged. *See, e.g.*, *United States v. Stebbins*, 61 M.J. 366, 368 (C.A.A.F. 2005)(applying Ronghi to rapes committed after 18 November 1997). We hold that the principles used by our superior court in *Ronghi* and *Stebbins* are equally applicable in a case involving murder under Article 118(2), UCMJ. Accordingly, we decline to grant the relief requested.

## Sentence Appropriateness

In his second assignment of error, the appellant asserts that his sentence is inappropriately severe. The appellant claims an appropriate remedy would be the disapproval of his sentence to LWOP and approval of a sentence of 25 years confinement. We disagree.

The appellant's crimes include unpremeditated murder and obstruction of justice by trying to conceal his involvement in that murder. These are extremely serious criminal acts that justify a correspondingly serious sentence. Taking into account all the facts and circumstances of this case, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we conclude that the sentence imposed is appropriate for the crimes committed and the person who committed those crimes. As such, we decline to grant the requested relief.

## Law Library Access

In the appellant's third assignment of error, he asserts that he was denied access to the courts because he lacked access to a law library during his incarceration at the Camp Lejeune Brig and because of the chronic understaffing of the Navy Marine Corps Appellate Defense Division. As a result of these violations, the appellant asserts that this court should reduce

his confinement to 25 years. Appellant's Brief at 14. We disagree.

Every accused has a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Access to the courts is met if the accused has either "adequate law libraries or adequate assistance from persons trained in the law." *Id*. at 828. An accused who is provided with legal representation has access to the courts, *Id*. at 830-31, as long as that representation does not hinder the accused's efforts to pursue a legal claim. *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

The record of trial clearly establishes that the appellant has been represented by counsel throughout the trial, post-trial, and appellate process, and the appellant does not deny that he had access to defense counsel at all stages. He merely claims that if he had access to an adequate law library in the brig while waiting for the CA to take his action, he could have researched and raised his first three assignments of error in the post-trial phase. The appellate also invokes *United States v. Lynn*, 54 M.J. 202, 207 n.11 (C.A.A.F. 2000), as support for his position that his legal representation hindered his effort to pursue legal claims. We reject these arguments. While our superior court recognized that the Navy-Marine Corps Appellate Defense Division was understaffed, it did not find that the appellate defense counsel assigned to this case was rendered incompetent to proceed on the appellant's behalf. Further, we find nothing in the present record to suggest that the appellant's defense counsel, trial or appellate, has in any way hindered the appellant's access to the courts. This issue is without merit.

**Ineffective Assistance of Trial Defense Counsel**

The appellant asserts, as his fourth assignment of error, that he was denied his sixth amendment right to effective assistance of counsel during sentencing. He claims that his trial defense counsel was deficient because he did not call witnesses to testify regarding the appellant's good military character and because he did not request a mitigation specialist. Appellant's Brief at 16. We disagree.

In reviewing allegations of this kind, appellate courts are to apply a "strong presumption" that a defense counsel provided competent representation at trial. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *see United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). In *Strickland*, the U.S. Supreme Court articulated a two-pronged test that an appellant must meet to establish ineffective assistance of counsel: (1) deficient performance; and (2) prejudice. *Strickland*, 466 U.S. at 687. Assuming that the appellant is able to demonstrate deficient performance, he must then show that "the deficient performance prejudiced the defense. This requires showing that counsel's

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

We specifically find that the trial defense counsel's performance was not deficient. During sentencing, trial defense counsel presented 16 exhibits, the sworn testimony of five witnesses who knew the appellant best, although none of these witnesses were military, and the appellant's unsworn statement. Limiting sentencing evidence to documents, non-military witnesses, and an accused's unsworn statement is routinely employed as a defense tactic to prevent cross-examination into military character. Following that tactic here was not deficient. Based on the entire record, we are confident that the appellant's trial defense counsel gave him zealous, professional representation that resulted in a fair trial. The sentencing case was appropriately calculated to humanize the appellant. We decline to grant relief on this assignment of error.

**Improper Argument**

The appellant contends that the trial counsel erred when he argued that the appellant intended to inflict great bodily harm and death upon his wife. The appellant requests that this court reduce the appellant's confinement to 25 years. Appellant's Brief at 19. We disagree.

During sentence argument, trial counsel stated: "His thoughts were of inflicting great bodily harm, and his intent was to kill Tonya Wallace as she lay there helplessly on the floor, her face pounded against the deck, and that awful popping sound ringing in the air." Record at 225. The appellant characterizes these words as arguing that the appellant's murder of his wife was premeditated. Murder without premeditation is described as a murder where "the accused had either an intent to kill or inflict great bodily harm . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 43b(2)(d). The Government's argument merely stated the required elements, and therefore was not improper.

Even assuming that the Government's argument was improper, trial defense counsel did not object to the argument. Failure to object to improper argument constitutes waiver of the objection absent plain error. R.C.M. 1001(g); *see United States v. Kropf*, 39 M.J. 107, 110 (C.M.A. 1994). The appellant bears the burden of persuasion as to all foundations of the plain error rule. *United States v. Powell*, 49 M.J. 460, 465 (C.M.A. 1998)(citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). Even if we were to find plain error, which we do not, the appellant has not identified any material prejudice to his substantial rights, nor do we independently divine any from our consideration of the record. Art. 59(a), UCMJ.

**Suspension For Confinement Served Plus One Year**

For his sixth assignment of error the appellant asserts that a period of suspension equal to the length of confinement plus twelve months is excessive and therefore a violation of public policy. The appellant asks this court to disapprove the period of suspension in excess of 5 years from the date the sentence was announced. Appellant's Brief at 21. We decline to do so.

Suspension of the execution of a sentence shall be for a stated period or until the occurrence of an anticipated future event, and shall not be unreasonably long. R.C.M. 1108(d). In *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993), the appellant was sentenced to confinement for 15 years, total forfeitures, reduction in rate to E-1, and a dishonorable discharge. The CA approved the sentence but, in an act of clemency, suspended confinement in excess of 10 years for the period of confinement adjudged plus one year thereafter. On appeal, we held that a suspension period that carried six years after the accused's release from confinement was unreasonably long under R.C.M. 1108(d). We reduced the period of suspension to the period of confinement actually served plus one day thereafter. *Id*. at 1043.

In *United States v. Ratliff*, 42 M.J. 797 (N.M.Ct.Crim.App. 1995), the accused was sentenced to confinement for 15 years, total forfeitures, a fine, and a dishonorable discharge. The CA approved the sentence but suspended confinement in excess of 10 years for the duration of actual confinement plus one year. In affirming the findings and sentence, we specifically held that the period of suspension was not unreasonably long, that placing an appellant on probation for the entire period of his confinement plus 12 months is reasonable as a control and motivating measure, and does not violate public policy or R.C.M. 1108(d). *Id*. at 802.

In this case, the period of suspension could run for as long as 31 years. We are mindful, however, that once the appellant's discharge is executed and he is released from an armed forces confinement facility, "he will lose his status as a person subject to the UCMJ and any suspended punishments will be remitted." *Gurganious*, 36 M.J. at 1042.[2] We do not believe that a period of suspension equal to confinement actually served plus an additional 12 months is unreasonable in length under the facts of this case, nor is it violative of public policy as a matter of law. We decline to grant the requested relief.

[2] "[S]eparation which terminates status as a person subject to the code shall result in remission of the suspended portion of the sentence." R.C.M. 1108(e).

## Staff Judge Advocate's Recommendation

The appellant asserts for his first summary assignment of error that the staff judge advocate's recommendation (SJAR) is defective because it fails to correctly state the pretrial agreement sentence limitation, and fails to state the appellant was honorably discharged from the U.S. Army. Appellant's Brief at 22.

The appellant's pretrial agreement states in part that "all confinement in excess of 30 years will be suspended for the period of ***confinement served*** plus twelve months thereafter . . . ." Appellate Exhibit II at 1. (Emphasis added). The SJAR states the convening authority is obligated to "suspend all confinement in excess of thirty (30) years for the period of ***confinement to be served*** plus twelve (12) months thereafter . . . ." SJAR of 28 Mar 2000 at 4. The CA's action contains the SJAR's recommended language of "to be served." We agree there is a slight disparity of language between the pretrial agreement and the CA's action concerning confinement suspension and we will direct corrective action in our decretal paragraph in order to preclude any possible confusion. Otherwise, this summary assignment of error lacks merit.[3]

## Unreasonable Multiplication of Charges

For his final summary assignment of error, the appellant asserts that charging kidnapping (Specification 1 under Charge IV) and premeditated murder (sole specification under Charge II) resulting from the same course of conduct is an unreasonable multiplication of charges. Appellant's Brief at 23. The Government summarily responds that this issue is moot because the military judge, *sua sponte*, found the two charges multiplicious for sentencing. Government Answer at 31-32. We do not find an unreasonable multiplication of charges.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.*

[3] The Government correctly notes that information concerning the appellant's honorable service in the U.S. Army National Guard and U.S. Army Reserve is contained in Prosecution Exhibit 14. Government's Answer at 27-29. The SJAR reflects the appellant's U.S. Army awards including the Army Achievement Medal. The CA specifically considered this information as part of the record of trial. CA's Action of 11 Jul 2000 at 3. This issue is without merit.

To determine whether there has been an unreasonable multiplication of charges, we consider five factors: (1) did the appellant object at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the charges misrepresent or exaggerate the appellant's criminality; (4) do the charges unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In deciding issues of unreasonable multiplication of charges, we also consider R.C.M. 307(c)(4), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." In considering all of these factors, we grant appropriate relief if we find "the 'piling on' of charges so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, authority [to affirm only such findings of guilty and so much of the sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved]." *Quiroz*, 57 M.J. at 585 (quoting *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000), *set aside and remanded on other grounds*, 55 M.J. 334 (C.A.A.F. 2001); *see also United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

After having consensual sex in the appellant's barracks room, the appellant and the victim, his estranged wife, got into an argument over the appellant's failure to provide support for their minor child. The victim threatened to tell the appellant's command that he had raped her when he had not. In response, the appellant struck the victim once in the head with his fist and she fell to the concrete deck. The appellant then grabbed the victim by the hair and banged her face into the concrete deck several times. He could see the victim's blood and heard her bones cracking, however, she was still alive. The appellant momentarily considered getting medical attention for the victim, but opted instead to protect his own self-interest. The appellant drug the victim's unconscious but living body to a car with the intent of disposing of the body even though he believed she would die without medical attention. The appellant drove the victim approximately 20 miles and disposed of her body in the woods. The appellant believed the victim died at some point during the trip, and that belief was supported by medical evidence. It was the appellant's intent that the victim die as he transported her from the scene of the beating to the location where he planned to dispose of the body. Record at 45-76; Prosecution Exhibit II. The appellant was originally charged with the premeditated murder of his wife “by an unknown means.” Charge Sheet.

Applying the non-exclusive *Quiroz* factors and the guidance provided by R.C.M. 307, we conclude that:

1. The appellant did not object to being charged with both murder and kidnapping at trial;

2. The charges are aimed at distinctly separate criminal acts;

3. The charges do not misrepresent or exaggerate the appellant's criminality;

4. The charges do not unreasonably increase the appellant's punitive exposure because LWOP is an authorized punishment for both premeditated murder and kidnapping; and,

5. Charging the appellant with premeditated murder and kidnapping was not overreaching or abuse in the drafting of the charges and specifications at the time of charging because the Government apparently did not know the cause of death.

We find on balance that charging the appellant with premeditated murder and kidnapping did not constitute an unreasonable multiplication of charges.

## Conclusion

The findings and sentence are affirmed as approved by the convening authority. To ensure compliance with the pretrial agreement, we note that the sentence is affirmed contingent upon the suspension of confinement in excess of 30 years for the period of confinement the appellant actually serves plus twelve months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

Chief Judge DORMAN and Senior Judge CARVER concur.

For the Court

R.H. TROIDL
Clerk of Court