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

BEFORE

Charles Wm. DORMAN **C.L. SCOVEL** **M.J. SUSZAN**

UNITED STATES

v.

Hector A. COLEMAN
Airman Apprentice (E-2), U. S. Navy

NMCCA 200101009 Decided 10 February 2006

Sentence adjudged 26 August 1999. Military Judge: R.G. Williams. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA.

CDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel
LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL II, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a general court-martial, composed of officers and enlisted members. Contrary to his pleas, the appellant was convicted of premeditated murder, felony murder, and robbery. The appellant's crimes violated Articles 118 and 122, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 922. The adjudged and approved sentence includes confinement for life without the possibility of parole, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant has presented 12 assignments of error for our consideration. He initially asserts that the evidence is legally and factually insufficient to support his conviction. He also asserts that the military judge erred in the following instances: when he denied the appellant's request for investigative assistance; when he allowed members of the victim's family to sit in the courtroom throughout the trial; when he admitted hearsay testimony made by an accomplice, Airman Recruit (AR) Carlos Saldana, to an investigator; when he failed to dismiss the multiplicious specification of felony murder; when he permitted

the members to consider the sentence of confinement for life without the possibility of parole; and when he denied a motion for a mistrial with respect to the sentencing portion of the appellant's court-martial. The appellant also alleges that he was denied effective assistance of counsel because his counsel: failed to question the members during voir dire and did not effectively exercise challenges of the members; failed to investigate exculpatory evidence and present it at trial; failed to object to improper argument of the prosecutor on findings; failed to adequately present evidence on sentencing; and admitted the appellant's guilt during argument. The appellant has also asserted plain error due to the argument of the prosecutor on findings. Last, the appellant argues that he was denied a speedy review of his conviction.

We have considered the 12 assignments of error, the Government's response, the appellant's reply brief, and the record of trial. We have also considered the excellent oral arguments of LT Colin Kisor, JAGC, USNR, representing the appellant and Major Raymond Beal II, USMC, representing the United States, presented on 20 April 2005. We conclude that following our corrective action, the findings and the 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.

Background

In April 1998, the accused, AR Saldana, and Seaman Apprentice (SA) Steve S. November were all serving together on board the aircraft carrier, USS THEODORE ROOSEVELT. They were friends. SA November received a federal income tax refund check, dated 10 April 1998, in the amount of $2,287.00. Airman (AN) Ethan Nelson testified that, during the week of 20 April 1998, they were all standing fire watch together on board the ship. During the afternoon of 21 April 1998, AN Nelson saw SA November inside the fire watch station. At that time, SA November had an envelope with money in it. AN Nelson saw the appellant and AR Saldana come into the fire watch office looking for SA November after 2000 hours.

On 23 April 1998 the body of SA November was found in the grass under a tree in a secluded area next to the parking lot for the Towers Apartment Complex in Newport News, VA. When he was found, SA November had $230.42 in his front pant's pocket. The medical examiner testified that SA November's death resulted from three of five gunshot wounds, one to the head and two to the chest. It could not be determined which wound caused the death, but any one of the three wounds could have done so. It was estimated that SA November died 24-48 hours prior to his body being discovered. Two bullets were recovered from SA November's body. A firearms' examiner testified that those bullets had been fired by a 9mm Ruger pistol. SA November purchased that pistol from a gun dealer in Hampton, VA, in January 1998. Law

enforcement agents seized the pistol in New York, NY, on 1 January 1999.

DNA testing determined that blood, found in the left rear seat of AR Saldana's car, was SA November's blood. An expert in forensic reconstruction testified that, based on the evidence, SA November was shot in the chest three times while he was in the vehicle. SA November's assailant was seated in the front passenger seat, and SA November was seated behind the driver, with his legs across the rear seat. SA November's body was turned, with the left side of his body towards the front of the vehicle. Afterwards, SA November's body was dragged to where it was found, where the gunshot wound to the head was sustained. This expert also testified that a gunshot wound to SA November's right arm was a re-entry wound from the gunshot to the head. In arriving at these conclusions the expert utilized reconstruction dummies.

Sufficiency of the Evidence

In his first assignment of error, the appellant argues that the evidence is factually insufficient to support his conviction for any of the crimes of which he was convicted. Appellant's Brief of 6 Oct 2003 at 3-9. The thrust of the appellant's argument is that the evidence suggests that AR Saldana, rather than the appellant, killed SA November. In making this assignment of error, the appellant argues that the Government's sole eyewitness, AR Saldana, is not credible, that the appellant's alibi stands unrebutted, and he points to inconsistencies in the Government's case.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). That standard is met in this case.

The test for factual sufficiency is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level.

See United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Applying these tests, we conclude that the Government presented credible evidence that established beyond a reasonable doubt that the appellant murdered SA November and that he did so while robbing SA November of his tax refund. While recognizing that there is no forensic evidence linking the appellant to the murder and robbery, we find the testimony of AR Saldana to be convincing. We also find that his testimony is corroborated by the testimony of Mr. Ivan Dockerty, as well as substantial circumstantial evidence.

We are convinced that the appellant had been keeping SA November's pistol, which was used as the murder weapon. We are also convinced that the appellant, AR Saldana, and SA November all got together on the evening of 21 April 1998, as AR Saldana testified. This conclusion is supported by the testimony of AN Nelson, who saw the appellant and AR Saldana looking for SA November in the early evening that night. Though AN Nelson's testimony does not directly contradict the testimony of the appellant's girlfriend, Ms. Highsmith, that she picked the appellant up from work on 21 April 1998 and spent the entire evening with him, it does call it into question. AN Nelson also testified that he did not see Ms. Highsmith near the ship that evening. We find Ms. Highsmith's testimony to be unworthy of belief.

We also find the testimonies of AR Saldana and Mr. Dockerty to be strikingly similar as to the details to the murder. AR Saldana testified as to what he recalls happening, having observed it. Mr. Dockerty testified about the murder and robbery based upon what the appellant told him had happened. Finally, we find the fact that the murder weapon was found in the appellant's New York City neighborhood to be compelling circumstantial evidence, particularly in light of Mr. Dockerty's identification of the murder weapon as the weapon the appellant sold to him shortly after the murder. Record at 724. Because AR Saldana testified under a grant of immunity and Mr. Dockerty testified in exchange for a reduction in sentence for a robbery he committed in New York, we examined their testimony with particular care. Based upon all the evidence of record, we do not find their testimonies to be uncorroborated, self-contradictory, uncertain or improbable. *See United States v. McKinnie*, 32 M.J. 141 (C.M.A. 1991). We give it credence. Accordingly, in light of all the evidence, we are convinced beyond a reasonable doubt that the appellant murdered SA November while robbing him of his tax refund.

Allegations of Judicial Error

The appellant has raised six assignments of error in which he alleges that military judge erred in various rulings he made during the trial. Specifically, he alleges the military judge erred when he denied the appellant's request for investigative assistance; when he allowed members of the victim's family to sit in the courtroom throughout the trial; when he admitted hearsay testimony concerning statements AR Saldana made to an investigator; when he failed to dismiss the specification of felony murder; when he permitted the members to consider the sentence of confinement for life without the possibility of parole; and when he denied a motion for mistrial with respect to the sentencing portion of the appellant's court-martial.

Four of these alleged errors concern the military judge's control of the court-martial. Such errors are reviewed for an abuse of discretion. *See United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)(concerning investigative assistance); *United States v. Roth*, 52 M.J. 187, 190 (C.A.A.F. 1999) (concerning sequestration); *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)(concerning admissibility of hearsay evidence); and *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003) (concerning mistrials). The issues of multiplicity and maximum punishment are questions of law and are reviewed *de novo*. *See United States v. Teeter*, 16 M.J. 68, 72 (C.M.A. 1983)(concerning multiplicity), and *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004)(concerning maximum sentence).

Abuse of discretion is a relatively high standard of review. It affords a degree of deference to the trial judge. An appellate court's mere disagreement with a decision made by the trial judge is not a sufficient basis to overturn that decision. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). "The standard requires that the military judge be clearly wrong in his determination of the facts or that his decision was influenced by an erroneous view of the law." *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005)(citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

> We review a military judge's evidentiary ruling for abuse of discretion. The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." We review conclusions of law *de novo*. *United States v. Reister*, 44 M.J. 409, 413 ([C.A.A.F.] 1996). As [our superior court] said in *United States v. Sullivan*, 42 M.J. 360, 363 ([C.A.A.F] 1995), "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law."

United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999).

1. Investigative Assistance

"[A]s a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense. . . ." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). Both before and during the appellant's court-martial, he requested either the appointment of an independent investigator, or funding to hire one himself. At trial, the appellant filed two motions related to this issue. Appellate Exhibits XV and XXVIII. He offered several appellate exhibits in support of his motion and he called Captain (CAPT) H. Lazzaro, JAGC, USNR, to testify on his behalf. Litigation of this issue is found at pages 67-112 of the record of trial.

CAPT Lazzaro is a Naval Reserve judge advocate with extensive experience in the prosecution and defense of complex cases. At the time he testified in this case, he was on active duty, having been recalled to establish a Capital Litigation Resource Center. Record at 86. In that capacity he instructed counsel who attended the Capital Litigation Defense Course that they should contact him whenever they had a client who was facing the possibility of a capital referral. *Id.* He also testified that he had been involved in approximately 100 homicide cases as either as prosecutor or a defense counsel, and that in his opinion in order to properly mount a defense in such cases it was essential to have an investigator assisting the defense counsel. *Id*. at 90. He cited at least two reasons for his belief. First, trained investigators have an advantage over lawyers because they know the ins and the outs of the police system in the locations in which they are conducting an investigation. Secondly, investigators are better witnesses when testifying about what another witness may have said, and thus establish more credible impeachment evidence. He also testified that an investigator was required in a case even where an accused was contesting a charge of shooting another individual in the leg. And he testified that "we do a great disservice to our service members when we don't give them [investigative] assistance" in a rape case. *Id*. at 96.

Before ruling on the motion, the military judge also learned that the appellant's case was the only case the lead defense counsel was working on. That same counsel had significant experience investigating cases, having been a police officer and having taught the subject. *Id*. at 80. Finally, the military judge was also made aware that the appellant had been provided a third class petty officer to assist his counsel, as well as the assistance of an independent psychiatric psychologist, a firearms examiner, a crime scene reconstruction expert, a forensic pathologist, and a forensic neuropsychologist. *Id*. at 105. The record also reflects that the appellant was offered funds for his counsel to travel to New York City to conduct an investigation.

In denying the appellant's motions, the military judge did not close the door on the appellant. He informed him that he

would reconsider the request if the appellant satisfied the applicable standard for investigative assistance. Later, the appellant claimed "surprise" when Mr. Dockerty revealed, for the first time, the last name of the woman he claimed sold the gun -- the murder weapon –- the appellant had sold to him. Following this testimony, the appellant did not ask the military judge to reconsider his ruling on the motion for investigative assistance. Furthermore, the military judge correctly advised the appellant of what he was required to demonstrate before being entitled to such assistance.

> First, why the expert assistance is needed;
>
> Second, what would the expert assistance accomplish for the accused;
>
> Third, why is the defense counsel unable to gather and present the evidence that the expert assistance would be able to develop?

Id. at 110. This is precisely the standard our superior court has recently reaffirmed. *Bresnahan*, 62 M.J. at 143.

In reviewing the record, we conclude that the military judge did not abuse his discretion in denying the motion for investigative assistance. The military judge correctly applied the law, following his conclusion that the appellant had not presented sufficient evidence to demonstrate the necessity of such assistance. His holding in that regard was not clearly wrong. As our superior court stated, "necessity requires more than the mere possibility of assistance from a requested expert. The accused must show that a reasonable probability exists both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial." *Id*. (internal quotes and footnotes omitted). The appellant did not make such a showing in this case.

2. Sequestration and Mistrial

"As with other evidentiary rulings, 'sequestration of witnesses and sanctions for violations of a sequestration order are matters within the discretion of the court.'" *Roth*, 52 M.J. at 190 (quoting *United States v. Oropeza*, 564 F.2d 316, 326 (9th Cir. 1977). At the appellant's trial, he first sought to have the family of SA November's mother and sister sequestered after at least one member of the family started to cry out loud when a videotape was played that showed the crime scene, with SA November's body still there. A court reporter noted in the record that "[t]he victim's family began vocally crying in the courtroom." Record at 441. At that point, the videotape was stopped and the members were excused from the courtroom. The appellant then immediately moved for a mistrial.

During the ensuing Article 39(a), UCMJ, session, the motion for mistrial was discussed and the trial defense counsel characterized the two individuals as "wailing" in the courtroom and then stomping their feet once in the hallway. The record does not reflect when the family members left the courtroom. The military judge stated that while the crying was "noticeable . . . it wasn't wailing or . . . over dramatic." The trial counsel agreed with that characterization, while the defense counsel did not. *Id*. at 443. The military judge denied the motion for a mistrial. When doing so, he specifically stated, "the court does not believe that Mrs. November's emotional display in any way prejudiced the members of this court." *Id*. He then invited counsel to propose "any instruction to the members to disregard that display for any purpose." *Id*. He also invited counsel to voir dire the members.

Before the members returned, the appellant asked the military judge to sequester "the November family." *Id*. at 444. Counsel cited no authority for the request for sequestration. Specifically, no mention was made of MILITARY RULE OF EVIDENCE 615, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). The military judge denied the request for sequestration, and recessed the court. When the court reconvened, the military judge announced that he had met with Mrs. November and her sister, with counsel present, and advised Mrs. November that if there were another emotional outburst in the courtroom, he would have her removed from the courtroom for the remainder of the trial. When the members returned, with concurrence of counsel, the military judge addressed the members:

> Members of the court, for obvious reasons we took this recess . . . . I am going to pose this question to you as a group and, if you have a positive response, please raise your hand. Now, was there anything about the emotional display you witnessed prior to this recess that would affect your impartiality in weighing the evidence in this case? Negative response from the members.

Id. at 446.

Prior to presentation of sentencing evidence, the appellant submitted a motion in limine to prevent the Government from presenting the victim impact testimony of SA November's mother, aunt, and sister. The only authority the appellant cited in his motion was MIL. R. EVID. 403. Appellate Exhibit CLVII. In responding to the defense motion, the Government relied upon *United States v. Taylor*, 41 M.J. 701 (A.F.Ct.Crim.App. 1995), *aff'd*, 44 M.J. 475 (C.A.A.F. 1996). That case cites the case of *Payne v. Tennessee*, 501 U.S. 808 (1991), which upheld the presentation of victim impact testimony.

The military judge denied the motion in limine, but cautioned the trial counsel to confine the aggravating evidence to be presented by these witnesses to "evidence that is directly relating to, or resulting from the offenses of which [the appellant] has been found guilty," in accordance with RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Record at 944.

During the sentencing phase of the trial, the Government called SA November's mother and sister as witnesses in aggravation. In total, their testimonies comprise 4 pages of the record. Following their testimonies, the appellant moved for a mistrial as to sentencing. The military judge denied the motion stating that in his opinion the "testimony was directly related to, or resulting from the offenses in this case." *Id*. at 951.

The appellant has raised two assignments of error that relate to the facts detailed above. He argues that the military judge erred when he allowed SA November's family to remain in the courtroom, and he also argues that the military judge erred when he failed to grant a mistrial on sentencing. With respect to both issues the appellant relies upon *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), and further argues -- without any authority -- that these errors are of constitutional magnitude. We find no error.

First, both issues are subject to review under an abuse of discretion standard. Based upon our review of the record we find the factual conclusions drawn by the military judge are not clearly erroneous. Furthermore, we cannot conclude that his rulings were based on an erroneous view of the law.

In *Spann*, our superior court found that the military judge erred by allowing a rape victim and her mother to remain in the courtroom after Corporal Spann had moved to sequester the victim, citing MIL. R. EVID. 615. The military judge allowed the victim and her mother to remain in the courtroom, after determining "that both the victim and her mother were likely to be called as government witness during sentencing. . . ." *Id*. at 90. Both eventually testified and presented victim impact evidence. The military judge relied upon the Victim of Crime Bill of Rights, 42 U.S.C. § 10606. The Court of Appeals for the Armed Forces found that the military judge erred because 42 U.S.C. § 10606 had no applicability in military courts at the time Corporal Spann was tried.[1]

In the case before us, the appellant did not cite MIL. R.

[1] This is no longer true. MIL. R. EVID. 615 was amended in 2002 by adding subparagraph (5) "to extend at courts-martial the same rights granted to victims by the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606(b)(4)." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), App. 22, at A22-49.

EVID. 615 when he moved to sequester the November family. The Government relies upon that fact in arguing that the appellant waived this issue. We do not find the issue quite so clear-cut. Even before the crying began in the courtroom, the military judge was aware that Mrs. November was a likely witness. In fact the military judge had informed the members that "Maria November" might be called as a witness. Record at 388. No other members of the November family were announced as potential witnesses. Thus, if the appellant had asked that Mrs. November be excluded from the courtroom, whether he cited MIL. R. EVID. 615 is not relevant. She should have been excluded. But that is not what the appellant did. First, the appellant moved for a mistrial. Second, without citing MIL. R. EVID. 615, the appellant asked that "all of the November family be sequestered from the courtroom to avoid any future potential . . . prejudice." Before the military judge ruled on the request, the appellant proposed that the November family be sequestered in a room where they could watch the procedures by "closed circuit TV." Record at 444. Thereafter, the military judge denied the request.

The language of MIL. R. EVID. 615 provides that "[a]t the request of the prosecution or the defense the military judge shall order *witnesses excluded* so that they *cannot hear the testimony of other witnesses*. . . ." (Emphasis added). While we do not find that the appellant waived this issue by failing to cite MIL. R. EVID. 615, we do find that the issue was waived because it is clear from the record that the appellant was not requesting that the November family be precluded from hearing the testimony of other witnesses. The appellant simply did not want the court-members exposed to the distraught November family. Furthermore, even if error, the *Spann* case itself demonstrates that the error would not be one of constitutional dimension. When finding error in *Spann*, the error was not subjected to a standard of harmless beyond reasonable doubt. *Spann*, 51 M.J. at 93.

With respect to the appellant's motion for a mistrial, based upon the testimonies of SA November's mother and sister, we find no error. And even if it was error to allow them to testify, that error was not of the nature to justify a mistrial, which is a "drastic remedy to be used sparingly to prevent a manifest injustice." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)(citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). Accordingly we hold that, even if the military judge abused his discretion in denying the appellant's motions to sequester the November family and for a mistrial on sentencing, the errors were harmless.[2] *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F. 1999); *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

[2] We have not considered the portion of the Declaration of trial defense counsel in which he asserts that SA November's family remained in the courtroom and cried throughout the trial. This assertion constitutes a fact from outside the record that could have been documented in the record.

3. Hearsay Evidence.

On 29 May 1998 Detective Sheppard, from the Newport News, VA, Police Department interviewed AR Saldana concerning SA November's death. Detective Sheppard testified as to what AR Saldana told him during that interview. The military judge admitted the evidence as a prior consistent statement made by AR Saldana under MIL. R. EVID. 801 (d)(1)(B). That rule provides that a statement of a declarant is not hearsay, if the declarant testified at trial and was subject to cross examination about the prior statement which was "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Id*. The military judge allowed this testimony after ruling that the testimony was admissible as evidence of a prior consistent statement and applying the balancing test under MIL. R. EVID. 403. Record at 656.

Detective Sheppard testified that AR Saldana told him that he was driving his car, the appellant was sitting in the passenger seat, and SA November was seated in the rear seat behind AR Saldana on the evening that SA November was killed. While SA November was seated sideways in the backseat looking out the back window, the appellant shot SA November with a gun that was chrome and black in color. The appellant then took money from SA November's pocket, eventually giving AR Saldana $300.00 to repair his car. AR Saldana also told Detective Sheppard that he believed the appellant had taken the gun to New York. *Id*. at 658-60.

Applying an abuse of discretion standard of review, we find no error. In ruling that the evidence was admissible, the military judge cited relevant case law from our superior court. *United States v. Allison*, 49 M.J. 54 (C.A.A.F. 1998). In our view he correctly applied the law to the facts of the case. Here the appellant, through his cross-examination of AR Saldana, raised the inference that AR Saldana's testimony was either a fabrication or was influenced by his desire to secure a favorable pretrial agreement in his own case. AR Saldana's negotiations for his pretrial agreement occurred in February 1999. While there may have been other reasons for AR Saldana to fabricate his testimony, reasons that arose much earlier than February 1999, "[w]here multiple motives to fabricate or multiple improper influences are asserted, the [prior consistent] statement need not precede all such motives or inferences (sic), but only the one it is offered to rebut." *Id*. at 57 (citing *United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990)). Here, AR Saldana's prior consistent statement was offered to rebut the implication that when he was negotiating his own pretrial agreement, in which he agreed to testify against the appellant, he either fabricated portions of his version of the facts or that he was improperly influenced to do so. AR Saldana's prior consistent statement to Detective Sheppard clearly rebuts the implied charge of recent fabrication or improper influence or motive.

Finally, we concur with the balancing evaluation conducted by the military judge. Record at 656. Where the testimony was limited to consistent statements that AR Saldana made to Detective Sheppard, evidence already before the members through the testimony of AR Saldana himself, we find minimal risk of unfair prejudice. And significantly, the danger of unfair prejudice did not significantly outweigh the probative value of the evidence. MIL. R. EVID. 403.

4. Multiplicity

In his eighth assignment of error, the appellant alleges that the military judge erred when he failed to dismiss Specification 2 of Charge I. The appellant argues that that specification, which alleges felony murder, is multiplicious for findings with Specification 1 of Charge I, premeditated murder, and the specification under Charge II, robbery. The Government concedes error. We concur. Both the appellant and the Government cite *United States v. Teeter*, 16 M.J. 68, 72 (C.M.A. 1983) wherein our superior court held that felony murder was multiplicious with a charge of premeditated murder and rape, where the felony murder alleged the rape. We find that case analogous to the facts before us, and will order the felony murder specification dismissed. Sentencing relief is not required because the members were instructed that the offenses were multiplicious for sentencing purposes.

5. Life Without Possibility of Parole (LWOP)

Congress created the punishment of LWOP in 1997 through its enactment of Article 56a, UCMJ: "[f]or any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement of life without eligibility for parole." The President amended the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) to implement Article 56a on 1 April 2002, by his Executive Order Number 13,262, 67 Fed. Reg. 18,773.

The appellant killed SA November on 21 April 1998. He was sentenced on 26 August 1999. The appellant argues that because the crime and sentencing occurred prior to the President's 2002 implementation of the amendment to Article 56a, the military judge was incorrect in instructing the members that LWOP was an available punishment.

The appellant recognizes that this court resolved the issue in a manner contrary to his position in *United States v. Wallace*, 58 M.J. 759 (N.M.Ct.Crim.App. 2003), *rev'd on other grounds,* 60 M.J. 348 (C.A.A.F. 2004). He invites us to review our decision in *Wallace,* citing *United States v. Lovett*, ACM 33947, 2002 CCA Lexis 230 (A.F.C.C.A., 9 Sep 2002), *reversed in part and remanded*, 59 M.J. 230 (C.A.A.F. 2004), *on remand*, 2004 CCA LEXIS 2001 (A.F.C.C.A. 2004), *rev. granted*, 61 M.J. 146 (C.A.A.F. 2005). However, in *Lovett*, the issue at bar was plead in the alternative, also arguing that there was insufficient evidence to

prove that any of Lovett's alleged acts of rape occurred after the effective date of the Article 56a amendment, 19 November 1997. In deciding *Lovett*, our superior court did not reach the issue of LWOP. *Lovett*, 59 M.J. at 231.

We also addressed the effective date of the legislation in *United States v. Thomas*, 60 M.J. 521, 526 (N.M.Ct.Crim.App. 2004), as did our superior court in *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004), *cert. denied*, 543 U.S. 1013 (2004). These cases hold that the statute authorizing LWOP is applicable for the offense of premeditated murder committed after 18 November 1997. The Court of Appeals for the Armed Forces followed *Ronghi* in *United States v. Traum*, 60 M.J. 226, 237 (C.A.A.F. 2004). The case law is now clear. The Article 56a amendment to the UCMJ was effective prior to the 1998 murder committed by the appellant and LWOP was an authorized punishment. Accordingly, we decline to grant relief.

Ineffective Assistance of Counsel

The appellant has raised multiple allegations that he was deprived of effective assistance of counsel during his trial. He alleges ineffectiveness in the following circumstances: 1) during *voir dire* and exercise of challenges to the members; 2) by failing to investigate and present exculpatory evidence; 3) by failing to object to improper argument; 4) by presenting damaging evidence during the sentencing phase of the trial; 5) by failing to present the appellant's testimony during the sentencing phase of the trial; and 6) by conceding the appellant's guilt during argument on sentencing. We have thoroughly considered the appellant's extensive arguments on each of these issues and conclude that the appellant was not denied effective representation under the applicable standards of review.

In reviewing allegations of ineffective assistance of counsel, we conduct a *de novo* review. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)(citing *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997)). In conducting that review we are bound to adhere to the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland* the Supreme Court declared that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must 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. Unless a defendant makes

> both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Additionally, the Supreme Court reasoned that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689.

In order to show ineffective assistance of counsel, "an 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)). When viewing tactical decisions by counsel, the test is whether such tactics were unreasonable under prevailing professional norms. *See United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001) (citing *Strickland*, 466 U.S. at 688-90); *United States v. Babbitt,* 26 M.J. 157, 158 (C.M.A. 1988); *United States v. Cronic*, 466 U.S. 648 (1984); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). We will not second-guess those tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)); *United States v. Clark*, 55 M.J. 555, 560 (Army Ct.Crim.App. 2001), *aff'd*, 56 M.J. 203 (C.A.A.F. 2001).

It is also strongly presumed that counsel are competent in the performance of their representational duties. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *Anderson*, 55 M.J. at 201; *Scott*, 24 M.J. at 188. To rebut the presumption of competence of counsel, the appellant is required to point to specific errors committed by his counsel, which, under prevailing professional norms, were unreasonable. *Scott*, 24 M.J. at 188 (citing *Cronic*, 466 U.S. at 648). "Acts or omissions that fall within a broad range of reasonable approaches [, however,] do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

Our superior court has also held that "[c]ounsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999)). Further, "'[w]e do not look at the success of a . . . trial theory, but rather whether [trial defense] counsel made an objectively reasonable choice in strategy from the alternatives available at the time.'" *Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998)).

This court need not reach the question of deficient representation if we can first determine a lack of prejudice. *United States v. Saintaude*, 61 M.J. 175, 180 (C.A.A.F. 2005); *Quick*, 59 M.J. at 386; *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 697). In order to constitute prejudicial error, the appellant's trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

In *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court recently provided a comprehensive explanation of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint of deprivation of effective assistance of counsel, an appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

To determine whether the presumption of competence is overcome, under the first prong of *Strickland*, we apply a three-part test:

> 1. Are the appellant's allegations true, and if so, is there a reasonable explanation for the lawyer's actions?
>
> 2. If the allegations are true, without a reasonable explanation, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?
>
> 3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Davis, 60 M.J. at 474. We now apply those standards to the case before us.

1. Voir Dire/Challenges

The appellant accurately states that his counsel did not conduct any voir dire of the entire panel of members, that they asked limited questions of several members, and that they did not challenge any member. He specifically complains that his counsel should have explored the members' beliefs and involvement with law enforcement, their knowledge of handguns, and the impact of the murder of one of the member's grandmother and aunt on his

ability to sit as a member of the appellant's court-martial. Appellant's Brief at 19-21.

"Voir dire is a critical dimension of a criminal trial. [It] serves to protect an accused's right to impartial fact-finders by exposing possible biases, both known and unknown, on the part of the [members.]" *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994). There is, however, no precise format to determine what is or is not adequate participation in this process. Clearly, in reviewing the adequacy of a defense counsel's participation, the entire process must be considered, to include a review of court-member's questionnaires, the questions asked by the military judge and the trial counsel, and the answers provided by the members.

In our view, the appellant's counsel actively participated in the voir dire process. Further, the one court-member whose family members had been murdered was challenged off the court-martial. With that member's removal from the court, the appellant was tried by a court composed of 11 members, providing the appellant with the best percentage chance of an acquittal -- an obvious tactical advantage. Additionally, we do not agree with the appellant's assessment that the Government's case was "built in large measure on the testimony of law enforcement agents" or that "an essential part of the [G]overnment's case consisted of evidence concerning the description and operation of . . . the murder weapon." Appellant's Brief at 20-21. This case rested on the credibility of AR Saldana.

Upon review of the record and the appellant's allegations, we conclude that we need not determine whether the appellant has demonstrated that his counsel's performance fell below the minimal standard under the first prong of *Strickland*. We reach this conclusion because even if counsel's performance was deficient, the "errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*." *Saintaude*, 61 M.J. at 183.

2. Investigate and Present Exculpatory Evidence.

The appellant next asserts that his counsel were ineffective because they failed to travel to New York City to investigate his case. He asserts they should have gone there to locate and interview several witness involved with the murder weapon, as well as the police officers and crime lab personnel who seized and tested the murder weapon. He also asserts that his counsel should have presented some evidence that AR Saldana had told others that he had killed SA November.

Counsel have an obligation to conduct a reasonable investigation or to determine that it is unnecessary to do so. *Sales*, 56 M.J. at 258. With respect to the allegations that his counsel did not adequately investigate this case, we find the appellant has failed to present a factual claim of ineffective

representation, rather his allegations are more akin to sweeping, generalized accusations. *United States v. Grigoruk*, 52 M.J 312, 315 (C.A.A.F. 2000).

As the Government argues in its brief, and as supported by the record, the appellant's case was the only case on the docket of the lead trial defense counsel. That counsel was also a former police officer who had taught investigatory procedures at the college level. The case was well-tried both in motions practice and the evidentiary phases of the trial. The only "proof" that counsel did not investigate the case, comes from the appellant's post-trial declaration of 17 September 2003. While counsel apparently did not travel to New York, that does not mean they did not adequately investigate the case. They could and obviously did interview witnesses who testified concerning the seizure of the weapon in New York City. The appellant has failed to demonstrate how traveling to New York would have changed the outcome of the case.

The appellant also alleges that his counsel failed to present evidence that may have exonerated him. Specifically, he alleges that his counsel failed to present evidence that AR Saldana had made a statement to two fellow prisoners, Mr. Jackson and Mr. Koons, that he had killed SA November, and that his counsel failed to present evidence that would have impeached the testimony of Mr. Ivan Dockerty, who testified that he received the murder weapon from the appellant.

In analyzing this issue, we begin with the presumption that the appellant received competent representation, and that he has the burden of surmounting that "very high hurdle." *Moulton*, 47 M.J. at 229. With respect to the evidence that AR Saldana may have said he shot SA November, the appellant concedes that his counsel was aware of the information he now relies upon to make his argument. We, too, have examined the Naval Criminal Investigative Service notes of the interview with Mr. Koons. Those notes are not the image of clarity, either in context or readability. We also note, as the Government does in its brief, that the details suggested by those notes are inconsistent with respect to the location of the murder and the apparent disposition of the murder weapon. Further, we have no proof that either Mr. Koons or Mr. Jackson were available to testify, or that if they testified their testimonies would have been consistent with the appellant's post-trial argument. We conclude that the notes themselves do not meet the very high burden the appellant is required to meet. Were we to find otherwise, we would turn the presumption of competence on its head. Furthermore, even if his counsel had been able to track down Mr. Koons or Mr. Jackson and get them to testify that AR Saldana said that he killed SA November, we conclude that that <u>impeachment</u> evidence would not give rise to a reasonable probability that, but for the lawyer's error, there would have been a different result. *Davis*, 60 M.J. at 474. As we previously have stated, we

find the evidence, proving the appellant's guilt beyond a reasonable doubt, to be compelling.

We similarly find that the potential testimony of a witness who was willing to testify as to the veracity of Mr. Dockerty, to include that Mr. Dockerty had said he was going to lie about the appellant's admissions to him about the murder and about receiving the murder weapon from the appellant would not have given rise to a reasonable probability of a different result. First, the circumstantial connections between the appellant and Mr. Dockerty lend credence to his testimony. Second, the appellant's counsel was aware of this witness and had discussed him with the appellant before deciding that he would not call that witness to the stand. Declaration of Commander Cave of 25 Aug 2003 at 2. That decision was an obvious tactical decision reached after consultation with the appellant. Again, to second-guess that decision turns the presumption of competence on its head. The appellant has the burden of persuasion on this issue and he has not met it.

3. Argument of Trial Counsel

During argument on findings the appellant's counsel commented as follows concerning the appellant's testimony:

> You could have asked him any question you liked. He was right there for you. The trial counsel could have asked him any question he liked. He was right there for you. There were any number of questions that were never asked. Not necessarily by yourselves, but by the trial counsel. So those are any number of questions to which you don't have an answer. And Hector Coleman could have answered them for you.

Record at 910. In his rebuttal argument, the trial counsel responded.

> Finally, the accused, he testified. And there was some questions we didn't ask him. Why? Because when you know he's going to lie, why throw out the question. Here's a guy who was prepped. He wasn't like Saldana. In Saldana, you saw who Saldana is, kind of lumped over, a dumpy guy, mumbles a bit, spits out the answers.
>
> But this guy, when he took the stand, I think the chair is still tilted. Look how it's angled towards you. He immediately got there and angled the chair towards you, and his answers came directly over to you. And, when he referred to the guys on the ship, we've got Nelson, we've got Fountain, we've got Saldana, but oh, the deceased, because we've got to show that we're close, Shateek (whispered). He was prepped and

ready.

> And as an attorney, I knew that. I also took into account something that was very, very, very important, that Marvette Highsmith said, whether he committed the murder or not, even if we had the murderer sitting here, right here, right now, Miss Highsmith (seated in the courtroom as a spectator), he would expect you to come in and help him with your testimony. In essence, he would expect you to come in and lie on his behalf. Yes, he would.

Id. at 917-18. The appellant also notes that the trial counsel's argument on findings were frequently delivered in first person. Appellant's Brief at 37.

The appellant asserts that the trial counsel's argument was improper and, standing alone, merits relief. He also argues that his counsel's failure to object to the trial counsel's argument is another example of his counsel's ineffectiveness. Since no objection was raised at trial with respect to the trial counsel's argument, the appellant would not be entitled to relief unless the argument constituted plain error. *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000). "To show plain error an appellant must establish an error which 'must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations". *Id*. (quoting *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)(internal quotation omitted).

It is improper for a prosecutor to state his personal opinions during argument. *United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). This is particularly true where counsel is stating a personal opinion about the credibility of a witness. *Id*. Prosecutors have been repeatedly reminded to drop the first person pronoun from their arguments. We do so again!

Nevertheless, when viewed in context, we do not find plain error in this case resulting from the improper argument of the trial counsel. First, the portion of the argument that was improper composed just a small portion of the entire argument. *See United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993). Second, the trial counsel's argument concerning unanswered questions was in response to the appellant's argument. *Young*, 470 U.S. at 11. We agree with the Government that the trial counsel was attempting to "right the scales." Government Brief of 4 Jun 2004 at 51 (citing *Young*, 470 U.S at 12.) Third, the appellant's failure to object to the argument is an indication of its minimal impact on the members. *United States v. Nelson*, 1 M.J. 235, 238 n.6 (C.M.A. 1975). Fourth, the military judge instructed the members that the arguments of counsel they had just heard were not evidence. Record at 919. Finally, we conclude that there is no plain error because there has been no

material prejudice to the appellant's substantial rights. *United States v. Powell*, 49 M.J. 460, 465 (C.M.A. 1998).

In that we conclude the improper argument of the trial counsel did not constitute plain error, we decline to grant relief. Since we have also found that the trial counsel's improper argument did not rise to the level of prejudice, the fact that the appellant's counsel did not object to the argument does not render his representation ineffective under the second prong of *Strickland*.

4. Extenuation and Mitigation

The appellant also asserts that he was deprived of effective assistance during the extenuation and mitigation phase of his court-martial. He specifically alleges that his counsel were ineffective because they did not allow him to testify or make an unsworn statement during the sentencing portion of his court-martial, and because they presented the testimony of Ms. McCray, the mother of the appellant's son, who provided damaging testimony. Appellant's Brief at 42-47.

In his brief, the appellant asserts that he "did not testify or make any unsworn statement because he was advised by his attorneys not to make any statement at all if he were going to maintain his innocence." Appellant's Brief at 45. This is consistent with the Appellant's Declaration of 17 Sep 2003. However, in his declaration, he stated that "[s]ince I was innocent I therefore did not make a statement to the members during sentencing." *Id.* The trial defense counsel addressed this issue in his declaration as well.

> After SR Coleman was convicted . . . I explained his right to make a statement, etc. a number of times. I explained very clearly that SR Coleman had the absolute right to make a statement. However, he consistently insisted that if he did so, he wanted to tell the members that he didn't commit the offense. I explained to him that such an approach on sentencing will likely guarantee LWOP. I explained the various traditional ways in which a person convicted over a not guilty plea can seek to appear remorseful without actually admitting they did in fact commit the offense. As a result of these discussions SR Coleman personally elected not to make a statement.

Declaration of Trial Defense Counsel at 1.

Given the statements of both the appellant and his trial defense counsel, we do not find any evidence that he was deprived of effective assistance of counsel, nor do we find any inconsistency between the appellant's declaration and that of his counsel. Additionally, not only did his counsel advise the appellant of the right to make a statement, so too did the

military judge, and the appellant acknowledged that he understood that right. Record at 940-41. The appellant has the burden to demonstrate how his failure to make a statement resulted in prejudice. *Davis*, 60 M.J. at 473. Yet he has failed to even suggest what he would have said to the members that might have resulted in a lesser sentence. Thus, not only has the appellant failed to meet his burden of proof on this issue but it is clear to us that the advice provided to the appellant by his counsel was sound, both legally and tactically. We will not second-guess that advice.

Appellant's counsel did present the testimony of Ms. McCray, the mother of the appellant's son. The appellant characterizes her testimony as "incredibly damaging to Appellant during the sentencing case." Appellant's Brief at 46. Again, we find that the appellant has failed to meet his burden of proof. *Davis,* 60 M.J. at 473. First, we do not agree with the appellant's assessment that the testimony was incredibly damaging. In her eight pages of testimony, Ms. McCray presented background evidence about herself and the appellant. She portrayed the appellant as her best friend who had provided her good advice, a concerned father to his son, and an individual who treated her daughter as if she was his own. On cross-examination, she acknowledged that the appellant did not provide monthly child support payments to her, but that he did provide some material support. The trial counsel also established that since the appellant was facing trial he had written her letters, expressing a desire to resume their sexual relationship, although there had been no such relationship since 1993. She also had the appellant's son in the courtroom.

Again, it is obvious to this court, that the decision to call Ms. McCray was a tactical decision by the appellant's counsel. We will not second-guess that decision. Furthermore, on balance, her testimony contained more favorable information about the appellant than adverse information. Since we are not convinced that, but for the adverse material elicited from Ms. McCray by the trial counsel, the appellant's sentence would have been less severe, we find that the appellant has not met the second, prejudicial, prong of *Strickland.*

5. Improper Argument by Defense Counsel

The trial counsel's argument on sentencing extends to just a page and a half in this nearly 1000-page record of trial. In that argument, the trial counsel argued that the appellant was a cold-blooded murderer, and he asked that the members sentence the appellant to a sentence that included LWOP. The assistant trial defense counsel presented argument to the members on sentencing. That argument runs for about three pages in the record. In that argument, the assistant trial defense counsel spoke about the appellant's relationship with his son and his son's mother. Counsel then stated, "Now, we're not making Hector Coleman what he is not. We are simply presenting the facts so that you have a

complete picture of the crime and who committed the crime." Record at 967 (emphasis added). Two paragraphs later, counsel continued, "In sentencing Hector Coleman, you will be holding him accountable for what he did." *Id*. (emphasis added).

Based upon the eight words emphasized above contained in this lengthy record of trial, the appellant seeks a new sentencing hearing alleging that his counsel was ineffective. The appellant alleges that these words concede guilt and that he did not authorize his counsel to concede guilt during argument. Appellant's Brief at 42-47. The Government concedes that the assistant trial defense counsel erred by making an argument that conceded guilt. Government Brief at 32.

We are not so certain that the argument of the assistant trial defense counsel conceded guilt. While we recognize that it can be read that way, a fair reading also would be that the members were to sentence the appellant for what they found the appellant had done. Certainly, the argument could have been more judiciously crafted. We note the similarity of counsel's language and the standard that this court uses in determining issues of sentence appropriateness. We consider the offense and the offender.

Nevertheless, for purposes of this appeal we will assume that the argument of the assistant trial defense counsel improperly conceded the appellant's guilt. *See Wean*, 45 M.J. at 464. In *Wean* our superior court stated, "in general, when an accused has consistently denied guilt, a functional defense counsel should not concede an accused's guilt during sentencing, not only because this can serve to anger the panel members, but also because defense counsel may be able to argue for reconsideration of the findings before announcement of the sentence." *Id*. (footnote omitted). At the time of the appellant's trial, however, while a concession of guilt may have angered the members, the Manual for Courts-Martial had been changed to preclude the members from reconsidering findings after they had been announced. R.C.M. 924(a).

We turn then to the prejudice prong of *Strickland* and find none in this case. We conclude that there is no reasonable probability these eight words produced a different sentence than would have been adjudged had they not been spoken. First, we agree with the argument of the trial counsel that the appellant was a cold-blooded murderer. Second, the words of the assistant trial defense counsel do not jump off the page in such a manner that they would have angered the members. Third, the members had already found the appellant guilty, in spite of his testimony that he was not even there when SA November was killed. Finally, the members only had two choices concerning the appellant's post-trial confinement -- life or LWOP. Given the heinous nature of the offense, we hold that the concession of guilt by the assistant trial defense counsel did not prejudice the appellant.

Post-Trial Delay

In his last assignment of error, the appellant asserts that he has been denied his right to timely appellate review of his case. The appellant does not allege prejudice. As relief for the delay between the date of trial and the date of the convening authority's (CA) action, the appellant prays that we set aside his sentence to confinement for life without the possibility of parole and approve a sentence of confinement for life. Appellant's Brief at 66-67.

A chronology of relevant dates will assist in understanding of the post-trial delay issue.

Date	Action	Days Elapsed Between Events	Total Days Since Date of Trial
26 Aug 99	Date Sentenced	0	0
05 Oct 99	Clemency Request	40	40
20 Oct 99	Clemency Request acknowledged	15	55
07 Mar 00	Record Authenticated	139	194
04 Apr 00	Record served on Trial Defense Counsel[3] (TDC)	28	222
28 Aug 00	SJAR Signed	146	368
04 Sep 00	Request for Extension of time to reply to SJAR	7	375
12 Sep 00	Request Granted	8	383
27 Oct 00	2nd Request for Extension of time to reply to SJAR	45	428
31 Oct 00	Request Granted	4	432
14 Dec 00	Reply to SJAR and 2nd Clemency Request	44	476
20 Dec 00	Addendum to SJAR	6	482
21 Dec 00	Appellant's Personal Request to Delay Action	1	483

[3] The trial defense counsel retired from the Navy between the date of trial and the date the SJAR was prepared.

03 Jan 01[4]	Appellant's request Received by CA.	13	496
12 Jan 01	CA seeks clarification of whether TDC represents appellant	9	505
12 Jan 01	TDC recommends appointment of substitute defense counsel	0	505
22 Jan 01	CA again seeks clarification of whether TDC represents appellant	10	515
23 Jan 01	TDC again recommends appointment of substitute defense counsel	1	516
01 Feb 01	CA requests appointment of Substitute Defense Counsel	9	525
08 Feb 01	Substitute Counsel Appointed	7	532
09 Feb 01	Record and SJAR served on Substitute Counsel	1	533
17 Apr 01	Response to SJAR and 3rd Clemency Request	67	600
02 May 01	Addendum to SJAR	15	615
14 May 01	CA's Action	12	627
13 Jun 01	Case Docketed	30	657

We consider four factors in determining whether 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); *see also Barker v. Wingo,* 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a

[4] In an obvious typographical error, this letter was dated 03 Jan 2000, vice 2001.

strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, the appellant's focus is on the entire period of delay. While we do not find the delay in this case to give rise to a presumption of prejudice, we do find the total delay to be facially unreasonable. Thus, we afford the appellant a due process review of the issue. As we examine each step in the appellate process, we find no individual step to have been facially unreasonable.

First, it took 657 days from the date of trial until the appellant's case was docketed with this court. Second, of that delay, over 200 days was spent awaiting an adequate response to the SJAR. We also note that in his first request for an enlargement of time to respond to the SJAR, the TDC wrote, "The length of time in which it took to review the record indicates its bulk, in terms of pages and complexity." Letter of TDC dated 4 Sep 2000. Indeed the record of trial is just shy of 1000 pages, and the appellant's 12 assignments of error are indicative of the complexity of the issues in this case. Thus, we find that the record itself and the allied papers provide an adequate explanation for the delay.

Third, the appellant did not assert a demand for timely appellate review while awaiting the CA's action; in fact he personally requested a delay. Appellant's letter dated 21 Dec 2000. Fourth, the appellant alleges no specific prejudice, and we find none. Thus 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. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *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). In *Tardif* our superior court made clear that this court could grant relief without a showing of actual prejudice in those cases where there has been excessive post-trial delay. The court said that we could grant relief "if [we] deem[ed] relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224. The court also made clear that we are required to consider unexplained and unreasonable post-trial delay in determining "what findings and sentence 'should be approved.'" *Id*. What is equally clear from *Tardif* is that while we are required to consider unexplained and unreasonable post-trial delay in determining what findings and sentence should be approved, whether we grant relief and, if granted, the nature of that relief, is a matter left to the discretion of this court.

We do not condone excessive delay. While we do not find such delay in this case, we recognize that the case could have been processed more quickly at virtually every step of the chronology detailed above. That is not the standard, however,

and we will not grant a windfall to the appellant. *United States v. Diaz*, 61 M.J. 594, 613 (N.M.Ct.Crim.App. 2005), *rev. granted*, No. 05-0500, 2005 CAAF LEXIS 1238 (C.A.A.F. Oct. 27, 2005). *See also, United States v. Brown,* ___ M.J. ___, No. 200500873, 2005 CCA LEXIS 372, (N.M.Ct.Crim.App. 30 Nov 2005)(en banc).

Conclusion

Specification 2 of Charge I is set aside and ordered dismissed. The remaining Charge and specification are affirmed. The sentence is affirmed, as approved by the convening authority. The supplemental court-martial order shall reflect the findings as modified by this decision.

Senior Judge SCOVEL and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court