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

BEFORE

D.A. WAGNER **C.L. CARVER** **R.E. VINCENT**

UNITED STATES

v.

Marquell SUTTON
Private (E-1), U. S. Marine Corps

PUBLISH
NMCCA 200200406 Decided 27 March 2006

Sentence adjudged 5 April 2001. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, SC.

Maj C. ZELNIS, USMC, Appellate Defense Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel
LT G.J. ROJAS, JAGC, USNR, Appellate Government Counsel

WAGNER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of unauthorized absence, unpremeditated murder, and obstructing justice by wrongfully impeding an investigation, in violation of Articles 86, 118, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 918, and 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for life without eligibility for parole, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence and, in accordance with the terms of a pretrial agreement, suspended confinement in excess of 40 years for 10 years from the date of the convening authority's action.

In his four assignments of error, the appellant claims that he was denied the effective assistance of counsel and speedy post-trial processing of his case. After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially

prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

Beginning around noon on 23 June 2000, the appellant and Lance Corporal (LCpl) Moore spent the afternoon drinking at LCpl Moore's off-base residence that LCpl Moore shared with Private First Class (PFC) Pikes and LCpl Allen. Around 2000, all four Marines found themselves drinking with other co-workers at the barracks on board Marine Corps Recruit Depot, Parris Island. At midnight, the entire group went to an off-base nightclub. While at the nightclub, the appellant danced with PFC Pikes, with whom he previously had a sexual relationship prior to the appellant getting married. The appellant told PFC Pikes that he wanted to have sex with her, but she declined because he was now married. Thereafter, while PFC Pikes was dancing with LCpl Cummings, the appellant pulled them apart. LCpl Cummings pulled PFC Pikes back to him and they continued dancing. The appellant walked away.

Around 0300, the appellant drove LCpl Moore back to LCpl Moore's residence and left. Sometime thereafter, the rest of the group from the nightclub showed up at the residence. Around 0420, the appellant returned to the residence and confronted LCpl Cummings, saying, variously: "Now who is you?", "What you doing here?", and "Get the f--- out of here." Record at 111; Prosecution Exhibit 1 at 5. The appellant then sought out LCpl Moore, who was sleeping in his bedroom. The appellant woke him and said, "You know there's a whole bunch of niggers in your house?" PE 1 at 5. The appellant then asked LCpl Moore where LCpl Moore's gun was located. Record at 111. LCpl Moore responded that the gun was in his vehicle.[1] *Id.* at 112.

PFC Pikes, overhearing the conversation between the appellant and LCpl Moore, including the appellant's statement that he was "about to go smack this motherf-----," went to LCpl Moore's car and retrieved the handgun to prevent the appellant from getting it. Record at 111. The appellant intercepted her as she was re-entering the residence with the gun and took the weapon from her.

With the weapon now in hand, the appellant confronted LCpl Cummings, calling him a "pussy-ass nigga," waiving the pistol at LCpl Cummings, and asking him, "who is you bitch ass, nigga?" and "what are you doing here?" *Id.* at 162; PE 1 at 6. When the appellant told LCpl Cummings, "Now nigga, tell us who you is,"

[1] Two days earlier, the gun in question, a 9-millimeter Taurus semi-automatic handgun, had been fired by LCpl Moore into his front yard during a domestic dispute. After firing the pistol, LCpl Moore took the pistol to the appellant's house and left it with him. He retrieved it later that same day. LCpl Moore had also previously fired the weapon into the air at a nightclub during an altercation involving the appellant.

LCpl Cummings responded, "my name is Damon, you all don't know me." Record at 114-15. At this point, the appellant chambered a round and LCpl Cummings put his hands in the air as if to surrender. LCpl Cummings then tried to leave, but the appellant struck him in the back of the head with the gun. As LCpl Moore attempted to intervene, the appellant struck LCpl Cummings a second time. LCpl Cummings turned and was reaching for the door to leave the residence when the appellant fired three shots at him, two of which struck LCpl Cummings in the back, resulting in his death. Following the shooting, the appellant fled the scene, threw the weapon into a river, and returned to his residence. The following morning, while riding in his vehicle with his wife and LCpl Allen, the appellant admitted to shooting LCpl Cummings and disposing of the weapon, stating that "a nigga got shot at your house last night," that he, the appellant, had been "asking the nigga who he was," and that "he got smart." *Id.* at 173-74.

Effective Assistance of Counsel

The appellant avers that his trial defense counsel provided deficient representation because he: (1) failed to present the findings of a defense-hired mitigation specialist during presentencing, (2) submitted a clemency request without consulting the appellant as to its contents and without attaching the mitigation specialist's findings, and (3) used a negative racial stereotype in the appellant's clemency request. We find that the appellant's contentions lack merit and decline to grant relief. Affidavits were submitted to this court by the appellant, the trial defense counsel, and the mitigation specialist who provided assistance to the defense team prior to trial. Pursuant to the holding of our superior court in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude that we can resolve the assigned error based on the pleadings of appellate counsel, the record of trial, and the affidavits, without ordering a post-trial evidentiary hearing.

In support of his assertions of deficient performance, the appellant submitted an affidavit to this court along with an affidavit from the mitigation specialist. In his affidavit, the appellant explained that, in preparing for trial, his defense counsel hired a mitigation specialist to gather character statements from the appellant's family and individuals who knew the appellant during his childhood. The appellant indicated that neither the mitigation specialist's findings nor the character statements from the appellant's family, teachers, coaches, and neighbors were presented during presentencing at the appellant's trial. The appellant claimed that he believed the mitigation specialist's findings and the character statements, if not presented at trial, would at least be enclosed in the appellant's clemency request to the convening authority.

The appellant averred that his trial defense counsel never showed him the clemency request before submitting it, nor did his trial defense counsel consult with him concerning why the

character statements were not enclosed with the clemency request. The appellant added that he did not prepare a clemency request on his own behalf because his trial defense counsel assured him that he would prepare one for him. The appellant claimed that, had he seen the clemency request prior to its submission, he would have directed his trial defense counsel to attach the character statements or he would have submitted them on his own.

The appellant's affidavit asserted that his trial defense counsel provided ineffective post-trial representation by using a negative racial stereotype, namely, the "gangsta' rap lifestyle," in the clemency request. Declaration of Appellant of 4 Aug 2004 at 2. The appellant stated that his trial defense counsel's unauthorized characterization of the appellant's "actions in terms of gang-related violence inspired by rap music" undercut the appellant's request for clemency. *Id*.

The mitigation specialist's affidavit confirmed that she conducted background research on the appellant for use during his sentencing in the event the charges were referred as capital. The mitigation specialist explained that she summarized interviews with, and obtained written statements from, the appellant's friends, teachers, and coaches. She also stated that she researched the appellant's medical and mental history. However, once the appellant reached a plea agreement, the mitigation specialist turned over all her findings, notes, and the character statements to the appellant's trial defense counsel. She indicated that she kept no copies of any written statements and that, due to the passage of time since her initial background investigation, it would be difficult to recreate all the information she had previously collected regarding the appellant.

Pursuant to an order of this court, the trial defense counsel submitted an affidavit. In his affidavit, the trial defense counsel articulated the initially dire outlook of the appellant's case given the possibility that the appellant might be charged with capital premeditated murder. Using the potential capital referral as a basis, the trial defense counsel was able to employ, at Government expense, the services of a mitigation specialist to research the appellant's background in order to provide mitigating evidence against the death penalty. The trial defense counsel also stated that he began a campaign to "bury" the Government in motions in the hope of making the prosecution of the case as a capital case so difficult that pretrial negotiations might result in a more favorable referral and, possibly, protection against a sentence of confinement for life without the possibility of parole.

Because of the non-capital referral of the case and the expected pleas of the appellant, the Government declined to continue funding the mitigation specialist, who said she turned over all of her notes and work product to the trial defense counsel. The trial defense counsel stated that he reviewed the

materials provided and incorporated them into his case files for use at trial or in post-trial clemency. The trial defense counsel asserted that he did not recall receiving any written statements of potential witnesses from the mitigation specialist. He stated that he made a tactical decision to use the materials only in clemency and not at trial in order to avoid opening the door to problems with the providence of the guilty pleas and to avoid addressing the appellant's extensive juvenile record at trial. The trial defense counsel also stated that based on his experience, the information relating to personality disorder could have acted to the detriment of the appellant if presented during presentencing.

In order to prevail on a claim of ineffective assistance of trial defense counsel, the appellant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the appellant must demonstrate that the trial defense counsel's performance was deficient. *Id*. at 687. Deficient performance means that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the appellant must demonstrate that the deficient performance prejudiced the defense, namely, that any errors "were so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable." *Id*. "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.* These constitutional standards are equally applicable before this court. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). In short, the appellant must demonstrate that the trial defense counsel's performance was deficient and that the deficiency worked to the appellant's detriment. *United States v. Lowe*, 50 M.J. 654, 657 (N.M.Ct.Crim.App. 1999)(citing *Strickland*, 466 U.S. at 694).

Demonstrating deficient performance of trial defense counsel on appeal is not an easy task. Indeed, the appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). Trial defense counsel enjoy a strong presumption of competence in the performance of their duties. *United States v. Cronic*, 466 U.S. 648, 658 (1984). To rebut this presumption, the appellant must identify specific errors that "were unreasonable under prevailing professional norms." *Scott*, 24 M.J. at 188. "Sweeping, generalized accusations will not suffice" to overcome this strong presumption. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). Where a claim of deficient performance is based on matters that should have been submitted by trial defense counsel, "the content of the matters that would have been submitted must be detailed." *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003). Our superior court requires an offer of proof to establish the contents of such materials and has held that failure to do so constitutes waiver. *United States v. DeGrocco,* 23 M.J. 146, 148 (C.M.A. 1987).

The difficult test for deficient performance is the result of the well-founded reluctance of the reviewing court to "'second-guess [defense counsel's] strategic or tactical decisions made at trial....'" *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Counsel's "[a]cts or omissions . . . that are tactical or strategic do not lead to a violation of the first prong of the test." *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). Nor should the reviewing court assess trial defense counsel's performance by the success of the case, but rather by whether counsel made reasonable choices in trial strategy from the alternatives available at trial. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). Accordingly, our scrutiny of trial defense counsel's performance "must be highly deferential" and not viewed through the potentially distorting lens of hindsight. *Strickland,* 466 U.S. at 689. On the other hand, trial defense counsel is "expected to present all known and available evidence which would manifestly and materially sway the outcome of the case." *United States v. King*, 13 M.J. 863, 866 (N.M.C.M.R. 1982).

The second prong of *Strickland* contains the prejudice component. *See Strickland*, 466 U.S. at 687. To satisfy this burden, the appellant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

1. Presentencing

We reject the appellant's assertion that his trial defense counsel provided ineffective representation by failing to present the mitigation specialist's findings during the presentencing phase of his court-martial. The record demonstrates that the trial defense counsel employed a reasonable trial strategy based on the law and the facts. The trial defense counsel made a tactical decision not to present the mitigation specialist's findings at trial. Instead, the trial defense counsel offered other extenuating and mitigating evidence during presentencing, including testimony by the appellant's mother, father, and wife. Through the testimony of the appellant's family, the trial defense counsel depicted the appellant's childhood, upbringing, and current family situation. The trial defense counsel also presented a letter describing the appellant's good behavior while confined in the brig. Further, the appellant made an unsworn statement consistent with the presentencing themes of remorse, rehabilitative potential, and family dedication. Finally, through cross-examination, the trial defense counsel expanded his presentencing themes by highlighting the violence surrounding the lifestyle of the appellant and his friends, to emphasize the environmental factors influencing the appellant's actions at the time of his offenses. Trial defense counsel's actions during presentencing were not unreasonable, nor were they outside the

wide range of professionally competent assistance. *See Strickland*, 466 U.S. at 690.

We find further support of the trial defense counsel's competence in the appellant's affidavit. The affidavit indicates that he and his family believed the mitigation specialist's findings and the character statements, if not presented during the trial, would be included, at least, in the clemency petition. Thus, the appellant's affidavit supports this court's finding that the trial defense counsel made a tactical decision to forgo submitting the mitigation specialist's findings during presentencing. We also find that the appellant was made aware of this tactical decision during trial. Thus, we reject the appellant's contention that his trial defense counsel provided deficient representation in failing to present the mitigation specialist's findings during presentencing.

However, even if we were to accept the appellant's contention that his trial defense counsel was deficient in failing to submit the mitigation specialist's findings, we are convinced that the appellant's sentence would have been the same. Further, the appellant fails to specifically identify the matters and their contents that he would have submitted to the military judge during presentencing. This case involved guilty pleas before a military judge alone, who we presume to know and appropriately apply the law. Further, the trial defense counsel negotiated a pretrial agreement that afforded the appellant substantial protection concerning confinement. Not only did the trial defense counsel's efforts assure that the charges were referred as non-capital, but he also negotiated a maximum sentence of 40 years as opposed to life without eligibility for parole.

The appellant's offenses were heinous and deserving of severe punishment. The appellant has failed to establish that his trial defense counsel's performance rendered the result of these proceedings "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)).

2. Clemency Petition

Trial defense counsel maintain responsibility for post-trial tactical decisions, but should act after consulting "the client where feasible and appropriate." *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994)(quoting Standard 4-5.2(b), ABA Standards for Criminal Justice, The Defense Function (3d ed. 1993)). In submitting a post-trial clemency request, defense counsel must evaluate what to submit to the convening authority and advise their clients if certain matters are inappropriate for submission. *Id*. Defense counsel are prohibited, however, from refusing to submit matters the client insists upon, or from submitting matters over the client's objection. *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997).

The trial defense counsel has primary responsibility for strategic and tactical decisions and must use judgment to determine what materials should be part of a clemency package, advising the client also where certain matters should not be submitted. *Id*. Our superior court has held that failure of the trial defense counsel to consult with the appellant, and submission of clemency materials to which the appellant has objected, constitutes deficient performance within the meaning of *Strickland. Id*.

In reviewing the materials submitted to the convening authority under RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), we will not normally speculate whether certain materials would have affected the convening authority's decision as to clemency. *Lowe,* 50 M.J. at 657. The appellant need make only make "'a colorable showing of possible prejudice'" in order to prevail on appeal. *Id.* (citing *United States v. Wheelus,* 49 M.J. 283, 288-89 (C.A.A.F. 1998)).

On behalf of the appellant, the trial defense counsel submitted a clemency request based on the appellant’s youth, his problem-filled upbringing, his wife’s and newborn son’s need for support and care, the impulsive nature of the offense coupled with the appellant’s undiagnosed and untreated alcohol abuse problem, as well as his rehabilitative potential. In support of the clemency request, the trial defense counsel attached the appellant’s high school records, his tenth-grade assessment test, his student profile, a psychological assessment, pages from his service record, and testimony of the appellant and his wife from the presentencing phase of the appellant’s trial. The trial defense counsel submitted an extensive and thought-provoking clemency request on the appellant's behalf, in which he effectively presented the appellant's substance abuse, childhood trauma, difficult upbringing, and personality disorders in an effort to explain the appellant's actions.

The trial defense counsel stated that he discussed the matters he intended to submit to the convening authority with the appellant prior to drafting the clemency request. The appellant does not claim that no such discussions took place, but rather stated in his affidavit that he understood at the time that the request would be discussed with him and provided for his review prior to it being submitted to the convening authority. There is no requirement that the trial defense counsel present the clemency request to the appellant prior to its submission. Moreover, we are not convinced that the materials provided by the mitigation specialist contained any written statements from prospective witnesses. We are also not convinced that the trial defense counsel omitted any substantial matter that was provided by the mitigation specialist from the clemency package. On the contrary, the attachments to the clemency request were documents provided by the mitigation specialist to the trial defense counsel.

In considering the affidavit of the mitigation specialist, we are puzzled by her statement that, although she maintained a file with some of her notes in it, she did not keep any of the written statements that allegedly existed. She provided no insight into what the contents of those statements may have been or even who made them. Also, we are puzzled by the mitigation specialist's statement that she disagreed with the trial defense counsel's characterization of the appellant as prone to violence and affected by the "gangsta" lifestyle that surrounded him. Specifically, she stated that her investigation revealed that the appellant "abhorred violence, and was not the type of person who would start a confrontation." Affidavit of Dale M. Davis of 2 Aug 2004 at 2. A review of the materials she provided, however, severely undercuts the accuracy of these statements. In the words of the mental health professionals who assessed the appellant at the age of fifteen, his profile "suggests a chronically high level of anger and a sense of being treated unfairly by others." The assessment continues, "[h]e exercises little effort at containing his anger, tending to express such anger through direct aggression toward persons or objects in his environment, with either verbal or physical means." Clemency request of 5 October 2001, enclosure (4) at 6.

Casting further substantial doubt on the mitigation specialist's affidavit is the fact that, while she stated that her investigation discovered no evidence of any gang activity in the appellant's past, the mental health assessment indicates that the appellant's mother expressly mentioned gang activity as a concern. During that assessment, the appellant's refers to his "G-men" and his "protection" as it relates to his involvement in fights in school and possible gang activity as an influence in the appellant's teenage life. *Id.* at 2. Based on these perplexing discrepancies, we give little weight to the affidavit provided by the mitigation specialist.

Even assuming, *arguendo*, that the communication between the trial defense counsel and the appellant was insufficient or non-existent and, therefore, constituted deficient performance, we nonetheless decline to grant relief because there is no prejudice to the appellant within the meaning of *Strickland. Strickland,* 466 U.S. at 687.

We have compared the information that the appellant asserts he would have included in the clemency request with the request actually submitted by his counsel. We have weighed all the submitted information against the backdrop of the facts of record to determine whether consideration of the new information raises a reasonable probability of more favorable action by the convening authority. We do not find that the appellant has demonstrated even a colorable showing of possible prejudice in this case. Although both affidavits reference the mitigation specialist’s findings and various character statements from the appellant’s family, teachers, and neighbors, the appellant has

not satisfied his burden of production under *Strickland*. The appellant has failed to bring to this court's attention specific information, such as the names of the persons who provided the character statements, the substance of each character statement, and how the statements would have favorably influenced the appellant's clemency request.

This court also notes that there is no reasonable likelihood that clemency beyond that granted in the appellant's extremely favorable pretrial agreement would have been granted under the circumstances of this case. The appellant shot and killed, without provocation, a fellow Marine after striking him twice with the murder weapon. The appellant sought out the firearm specifically to confront the unarmed victim. When the appellant menaced the victim with the firearm, the victim raised his hands in an apparent act of surrender and turned toward the door, attempting to leave the area. As the victim reached for the door, the appellant fired three shots, striking the victim in the back twice. Following the shooting, the appellant threw the gun into a river and returned to his home. Several hours later, the appellant spoke of the killing nonchalantly to his wife and a friend, stating, "a nigga was killed". Nothing in the appellant's actions that night or during trial indicated strong remorse for his victim. The appellant later lied to investigators about his actions.

Further, the appellant's prior service was poor. During the last two years of the appellant's three years of active duty, the appellant had been convicted at a summary court-martial and received four nonjudicial punishments, three of which were for alcohol-related incidents. The trial defense counsel submitted a thorough and compelling clemency request on behalf of the appellant. When we weigh the matters raised in the appellant's affidavit, coupled with the clemency request submitted by counsel, and the facts of this case, we find that the appellant has not shown a reasonable probability of more favorable action by the convening authority. Accordingly, the appellant has failed to meet his burden of establishing even a colorable showing of possible prejudice with respect to his claim that his trial defense counsel provided ineffective assistance.

We now turn our attention to the appellant's last claim of ineffective representation, in which the appellant cites as error his trial defense counsel's use of the term "gangsta rap lifestyle" as a negative racial stereotype. Taking the phrase in the context of the entire clemency request, the appellant's trial defense counsel appears neither to have been commenting on the appellant's race, nor uttering a racial slur. Trial defense counsel used the phrase, derived from facts elicited during pretrial interviews with witnesses, evidence presented at the appellant's trial, and documents provided by the mitigation specialist, to describe an environment rampant with violence. Similar to his approach during presentencing, the trial defense counsel, in the clemency request, highlighted the violence

surrounding the lifestyle of the appellant and his friends to emphasize the environmental factors influencing the appellant's actions at the time of the offense. Throughout the clemency request, the trial defense counsel continued emphasizing his themes of remorse, rehabilitative potential, family dedication and the role of environmental factors.

Even if the phrase constituted a racial slur, which we expressly reject, the appellant was not prejudiced. The appellant failed to show there is a "reasonable probability" of more favorable action by the convening authority if the deficient clemency submission had not been submitted. *See Hood*, 47 M.J. at 98. Trial defense counsel extended his presentencing themes into his post-trial representation of the appellant, portraying the appellant as being remorseful, having rehabilitative potential, and being influenced by environmental factors. Furthermore, the heinous nature of the appellant's offense coupled with the appellant's favorable pretrial agreement limiting his maximum confinement to 40 years undercuts the appellant's assertion that absent the phrase, the convening authority would have granted clemency to the appellant. Accordingly, the appellant has failed to carry his burden of demonstrating even a colorable showing of possible prejudice regarding his claim that his trial defense counsel provided ineffective assistance by using a negative racial stereotype in the clemency request.

Post-Trial Processing Delay

In the appellant's final assignment of error, he contends that he was denied timely post-trial review of his court-martial and asks this court to set aside the findings and sentence or, alternatively, affirm only so much of his sentence that does not exceed confinement for 30 years. We disagree and decline to grant relief.

1. Due Process

We look to four factors in determining if post-trial processing delay has violated 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)).

The record of trial was docketed with this court less than one year after the trial adjourned. The military judge sentenced the appellant on 5 April 2001 (Day 0). The convening authority took action on 15 October 2001 (Day 193). The three-volume, 235-page record of trial was docketed with this court on 4 March 2002 (Day 333). On 31 August 2004 (Day 1244), after filing 24 enlargements of time with this court, the appellant filed his brief containing four allegations of error. Of note, however, the appellant's 17th through 22nd motions for enlargement

specifically indicate that the appellant consented to the enlargements of time. On 22 February 2005, the Government filed its answer (Day 1419).

The crux of the appellant's assignment of error focuses on the delay after his case was docketed with this court on 4 March 2002. Appellant's Brief at 13. Although this delay was less than ideal, we do not find it unduly excessive or unreasonable.

Even if we were to conclude that the delay in this case was unreasonable or excessive, we would still decline to grant relief. There has been no due process violation resulting from the post-trial delay in this case. First, the delay is not so excessive as to "'give rise to a strong presumption of evidentiary prejudice'" *Jones,* 61 M.J. at 83 (quoting *Toohey*, 60 M.J. at 102). Second, the appellant presents no evidence to support his claim that his case was delayed because of the excessive workload of his appellate defense counsel. Such a sweeping generalization is of no benefit to the court in making a determination as to whether delay was attributable to any Government neglect in providing adequate numbers of appellate defense counsel at any given time to conduct the required reviews and competently represent their assigned clients.

Third, the appellant made no formal assertion of the right to a timely appeal. We do note, however, that the appellant's affidavit asserts that he contacted his detailed appellate defense counsel several times during the pendency of his review to check the status of his case, but was allegedly told that the large backlog of cases prevented the appellant's first appellate defense counsel from reviewing the appellant's case prior to that counsel's transfer.

Fourth, in reviewing the case for prejudice, despite the appellant's assertion, this court does not find any evidence of actual prejudice or other harm to the appellant resulting from the delay. The appellant asserted prejudice in the exercise of "his rights to request clemency, or to have that prejudice remedied by subsequent convening authority action." Appellant's Brief at 15. The appellant claimed that the passage of time (1) decreased the likelihood that the mitigation specialist's findings would still be intact, (2) increased the likelihood that the memories of the individuals who provided information to the mitigation specialist would be faded, and (3) decreased the likelihood that a revised clemency request containing a reconstructed mitigation package would receive the same consideration from a new convening authority that such request would have received immediately following the appellant's trial. The appellant added that the sentence imposed upon him hinders his ability to fund the mitigation specialist's efforts to reconstruct her findings.

The mitigation specialist stated that she did not keep a copy of the materials sent to the trial defense counsel.

Additionally, the trial defense counsel incorporated the materials he received into his case files for use at trial and in preparing a clemency package. Many of the appellant's family members actually testified on his behalf at trial. The appellant provides no specific information as to what statements in addition to those of the testifying family members would have been included in his clemency request. In short, the passage of time has had no impact that we can discern on the appellant's post-trial processing. We find no prejudice resulting from the delay.

B. Article 66, UCMJ

This court recently addressed post-trial delay as a factor under Article 66, UCMJ. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We apply the factors enumerated in *Brown* in our determination as to what findings and sentence should be affirmed in this case under Article 66, UCMJ. In addition to the factors enumerated above, the record of trial is lengthy and involves some complex issues raised by the appellant in his initial brief and assignments of error. The appellant advances no evidence of bad faith or gross negligence on the part of the Government, other than the broad claim that the appellate defense counsel's workload was excessive and that the Government failed to provide adequate numbers of appellate defense counsel. As we stated earlier, without the benefit of information regarding the number and type of cases that the appellant's counsel was carrying and whether other counsel were or were not available to assist, such broad allegations are not of use to the court. We find no harm suffered by the appellant as a result of the delay. None of the appellant's allegations of error ultimately provided a basis for relief in his case. Finally, the appellant was convicted of committing a heinous murder. The appellant was the beneficiary of an extremely beneficial pretrial agreement. The delay in this case does not affect the findings and sentence that should be approved in this case. We decline to grant relief.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court