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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Timothy D. WEBB
Corporal (E-4), U.S. Marine Corps

NMCCA 200101957 Decided 18 March 2005

Sentence adjudged 9 May 2000. Military Judge: C.A. Porter. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR EVELIO RUBIELLA, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LCDR MONTE G. MILLER, JAGC, USNR, Appellate Government Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of sodomy on divers occasions with a male under the age of 16 years, committing indecent acts on divers occasions with the same underage individual, and the receipt and possession of child pornography by use of his personal computer. The appellant's crimes violated Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934, and 18 U.S.C. §§ 2252A(a)(2) and (a)(5). The military judge sentenced the appellant to a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority (CA) approved the adjudged sentence and, in accordance with the terms of a pretrial agreement, suspended confinement in excess of 8 years for 12 months from the date of trial.

We have examined the record of trial, the appellant's four assignments of error[1], and the Government's responses. In light of the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the Court of Appeals for the Armed Forces' ruling in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), both decided after the appellant's court-martial, we conclude that the providence inquiry conducted by the military judge into Specifications 2 and 3 of Charge II was deficient. We also conclude that the appellant did not receive effective assistance of counsel during the sentencing phase of his court-martial. We shall take corrective action for these errors in our decretal paragraph. Following our corrective action, we conclude that the remaining findings are correct in law and fact and that no errors remain that materially prejudiced the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. We find no merit in the appellant's Supplemental Assignment of Error, *United States v. Kohut*, 44 M.J. 245 (C.A.A.F. 1996), and will not address it further.

Providence

The appellant was convicted in Specifications 2 and 3 of Charge II of the receipt and possession of child pornography, both on divers occasions. These offenses were alleged as violations of Article 134, UCMJ, and 18 U.S.C. § 2252A(a)(2) and 18 U.S.C. § 2252A(a)(5), respectively. In his second assignment of error, the appellant alleges that his guilty pleas to these two specifications are improvident because "[t]he military judge did not explore whether the images [a]ppellant possessed were of actual children or were virtual computer-generated images." Appellant's Brief of 18 Nov 2003 at 14. He also notes that Prosecution Exhibit 1, a stipulation of fact, does not address

[1] Assignments of Error:

> I. THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS AND MISJUDGMENTS DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.
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> II. APPELLANT'S PLEAS TO SPECIFICATIONS 2 AND 3 OF CHARGE II, KNOWINGLY AND UNLAWFULLY RECEIVING AND POSSESSING CHILD PORNOGRAPHY, WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO ESTABLISH A FACTUAL BASIS THAT THE IMAGES APPELLANT POSSESSED WERE OF ACTUAL CHILDREN.
>
> III. THIS COURT SHOULD DISAPPROVE THE PUNITIVE DISCHARGE ADJUDGED AT APPELLANT'S COURT-MARTIAL IN LIGHT OF THE UNREASONABLE AND UNEXPLAINED DELAY OF OVER 17 MONTHS BETWEEN THE DATE OF TRIAL AND THE DATE OF THE CONVENING AUTHORITY'S ACTION.
>
> SUPPLEMENTAL: THE COURT-MARTIAL DID NOT HAVE JURISDICTION TO TRY APPELLANT SINCE APPELLANT HAD BEEN PREVIOUSLY CONVICTED BY A STATE COURT FOR SUBSTANTIALLY THE SAME ACTS THAT WERE THE SUBJECT OF THE COURT[-]MARTIAL PROCEEDINGS AND THERE IS NO EVIDENCE ON THE RECORD THAT THE PRIOR PERMISSION OF THE JUDGE ADVOCATE GENERAL (CODE 20) WAS ACQUIRED BEFORE REFERRAL OF APPELLANT'S CASE TO A GENERAL COURT[-]MARTIAL.

this issue. The appellant primarily bases his argument on two cases, *Free Speech Coalition* and *O'Connor*.

In *O'Connor* our superior court addresses the impact of *Free Speech Coalition* upon military jurisprudence as it relates to prosecutions brought under the Child Pornography Prevention Act (CPPA) of 1996, 18 U.S.C. §§ 2251-2260. Noting specific definitional sections of the CPPA (18 U.S.C. § 2256(8)) that had been ruled unconstitutional by the Supreme Court, our superior court ruled that:

> In the wake of *Free Speech Coalition*, the relevant provisions of 18 U.S.C. § 2256(8) require that the visual depiction be of an actual minor engaging in sexually explicit conduct. The "actual" character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA.

O'Connor, 58 M.J. at 453. *O'Connor* also examined the question of whether it was possible to affirm the conviction in that case as a violation of the service discrediting provision of Article 134, UCMJ. While recognizing that possibility, the court rejected that approach in *O'Connor* because "there was no discussion of that element by either [a]ppellant or the military judge during his plea inquiry." *Id*. at 454.

We turn now to an examination of the appellant's providence inquiry. Prior to questioning the appellant about his receipt and possession of child pornography, the military judge listed the elements of those crimes for the appellant. The military judge also provided the appellant with the following definition:

> "[C]hild pornography" means any visual depiction, including a photograph, film, video, picture, or computer generated image or picture, whether made or produced electronically, mechanically or by other means of sexually explicit conduct where the production of that visual depiction involves the use of a minor engaging in sexually explicit conduct or the depiction appears to be a minor engaging in sexually explicit conduct or the depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in such conduct or that the depiction has been advertised or promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains visual depictions of minors engaging in sexually explicit conduct.

Record at 18-19. The military judge did not repeat this definition, or incorporate it into the elements of the specification alleging possession of child pornography. This definition contains elements that were specifically found to be

unconstitutional in *Free Speech Coalition*. *See O'Connor,* 58 M.J. at 452.

During the inquiry into the providence of the appellant's guilty pleas to Specifications 2 and 3 of Charge II, the appellant admitted that he both possessed and received child pornography. The military judge, however, did not elicit from the appellant that the visual depictions he both received and possessed were depictions of actual children. Since both *Free Speech Coalition* and *O'Connor* were decided after this case was tried, the military judge had no reason to delve into what is now a critical requirement. Since he did not delve into it, however, the appellant's pleas to both Specification 2 and 3 of Charge II are improvident.

We turn then to the issue of whether we may affirm a conviction to the lesser included offense of both these specifications -- conduct prejudicial to good order and discipline or conduct that is service discrediting. *O'Connor,* 58 M.J. at 454; *see also United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004); *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000); and *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000). We hold that we cannot.

With respect to both specifications, the military judge asked the appellant if his conduct was service discrediting, and whether it was prejudicial to good order and discipline. The appellant simply answered those questions with a "Yes, sir." Record at 28-29. This simple agreement did not provide a factual basis for what was no more than a legal conclusion. Such conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). We will provide relief in our decretal paragraph.

Assistance of Counsel

In his first assignment of error the appellant asserts that he was denied the effective assistance of counsel by his civilian defense counsel. The appellant asserts the following deficiencies in his representation at his court-martial: (1) His civilian defense counsel refused to request a continuance when he was notified just two days before trial that the Government was going to call an expert witness in the sexual victimization of children; (2) His counsel failed to contact Dr. Miller, a witness who had prepared the psychosexual evaluation concerning the appellant; (3) His counsel did not present any witness during the sentencing phase of the appellant's trial, even though the detailed defense counsel had urged him to call the appellant's father to testify; and (4) His counsel presented a "woefully inadequate and inflammatory sentencing argument." Appellant's Brief at 12. In that argument, his counsel suggested that what the appellant had done was no more offensive than the actions of servicemen who had sexual relations with 15-year-old prostitutes

during the Vietnam era and submitted to the trial judge that he should not sentence the appellant to any confinement.

In support of the appellant's allegations that his counsel failed to provide him with effective assistance, the appellant refers us to documents submitted to the convening authority on 2 August 2000 as enclosures to his clemency request. Included in that request are the affirmative statements of the detailed defense counsel concerning his dealings with the civilian counsel prior to and during the appellant's court-martial. Additionally, the clemency request included letters from Mr. Scartz, a court-appointed attorney who represented the appellant in his state court trial for essentially the same offenses involving the 15-year-old male, as well as a letter from Dr. Miller.

Following our initial review of the pleadings, the record of trial and all the allied papers, this court "determined that the appellant's allegations of ineffective assistance of counsel, if unrebutted, would overcome the presumption of competence. . . ." N.M.Ct.Crim.App. Order of 6 Dec 2004. Accordingly, we ordered the Government to contact the appellant's civilian defense counsel "and secure, in affidavit form, his responses to the appellant[']s allegations of ineffective assistance of counsel as contained in the appellant's clemency request and brief." *Id*. The Government complied with that order, submitting an affidavit from the civilian counsel on 8 February 2005.

In his affidavit, the civilian counsel details his trial strategy. First, he notes that since the appellant had confessed to engaging in homosexual relations with a minor it would have been pointless to contest the case. Rather, counsel sought to "negotiate the best deal we could with the most favorable cap on confinement we could obtain, and then try to 'beat the deal' by obtaining a lesser sentence of confinement at sentencing." Affidavit of Civilian Counsel of 28 Jan 2005 at 2. He further noted his belief that "members of the Marine Corps are inherently homophobic," *id*., and thus he was "greatly relieved" when a Naval Reservist, who is also a state court judge, was assigned as the military judge. *Id*. at 3. When he learned that the Government was going to call an expert witness during sentencing, he made a "tactical decision not to seek a continuance because if we had done so my client's guilty plea would have been taken by an active duty judge after the [R]eserve judge had completed his two week tour of duty." *Id*. at 3-4. Civilian counsel discounted the effectiveness of that expert witness, "believ[ing] that no experienced judicial officer would give much weight to the testimony of the [expert witness] who lacked any legitimate scientific status." *Id*. at 4. Concerning counsel's sentencing argument, he tailored his argument in the manner he did because he believed that the military judge was "familiar with the R&R practices in Thailand and elsewhere during the Vietnam [W]ar." *Id*. at 5. He also states that he argued for no confinement because his client asked him to do so. Nowhere in his affidavit, however, does he address the issue of why he did not call Dr.

Miller as a witness to rebut the testimony of the Government's expert witness.

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 *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987), our immediate superior court made clear that these same standards are equally applicable before military courts.

Accordingly, military appellate courts have routinely applied these standards. 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)(citing *United States v.*

Cronic, 466 U.S. 648 (1984)); *Scott*, 24 M.J. at 188 (citing *Cronic*, 466 U.S. at 648). 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 strongly presumed that counsel are competent in the performance of their representational duties. *Quick*, 59 M.J. at 386 and *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). Further, the appellant must establish a factual foundation for a claim that his counsel's representation was ineffective. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). An appellant's sweeping, generalized accusations will not suffice. *Id*. (citing *Moulton*, 47 M.J. at 229.

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. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *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)).

We now apply those standards to the case before us. Prior to trial the Government was aware that Dr. Miller, the Clinical Director of The Augustus Institute, had evaluated the appellant. Dr. Miller's institute had been selected by the U.S. Department of Justice "as one of its model programs in the diagnosis and treatment of sex offenders." Dr. Miller's Letter of 3 Aug 2000 at 3. In his evaluation, Dr. Miller stated that he did not consider the appellant a pedophile, that the appellant would greatly benefit from treatment, and that the appellant did not "represent[] a threat or danger to others." Defense Exhibit A at

Tab B, Dr. Miller's Report of 13 Sep 1999 at 7. Two days prior to trial the Government informed the defense that they intended to call Special Agent (SA) Lanning, an "F.B.I. profiler as a witness for sentencing." Clemency Request of 2 August 2000 at 2. With this information, the detailed defense counsel suggested to civilian counsel that they call Dr. Miller to rebut the testimony of SA Lanning. The civilian counsel rejected the idea. *Id*. The detailed defense counsel further suggested that they should "at least request a continuance in order to properly interview the [G]overnment's witness and obtain additional information." *Id*. at 2-3. Civilian counsel also rejected that suggestion. *Id*. at 3. Dr. Miller was not asked to testify. Dr. Miller's Letter at 1.

During the sentencing phase of the appellant's court-martial the Government called SA Lanning as a witness. He was accepted as an expert witness in the behavioral aspects of the sexual victimization of children. He testified that he considered this case to be one dealing with a "preferential seduction molester," and that the appellant had interacted with the victim "through a seduction process." Record at 64. He placed the appellant in the category of "the most persistent and prolific of all child molesters." *Id*. at 66. He noted that such molesters have recidivism rates twice as high as those who have a preference for females and that "men who victimize boys outside the family generally have the highest number of victims." *Id*. at 67. He further testified that the appellant is of the type that would be very difficult to change, and that he would consider him extremely dangerous because of the potential for "astronomical numbers of victims." Record at 67-68. He then went on to attack the substance of Dr. Miller's evaluation. His testimony on direct examination extends for 20 pages -- one-fifth of the record of trial. During cross-examination, civilian counsel asked only three questions, eliciting that SA Lanning was not licensed to provide psychosexual treatment in Virginia, and that he had not interviewed the appellant or the victim.

In his letter of 3 August 2000 to the convening authority, Dr. Miller states, "I . . . took the fact that I was not requested to testify . . . as meaning that Timothy Webb's civilian defense attorney had concluded that my written report was sufficient for his purposes. However, a review of the transcripts of the military trial suggests otherwise." Dr. Miller's Letter at 1-2. He then essentially summarizes how he could have rebutted numerous aspects of SA Lanning's testimony.

While not necessarily agreeing with counsel's decisions not to request a continuance when informed that the Government was going to call SA Lanning as a witness, not to call the appellant's father as a witness, and the propriety of the noted portions of counsel's argument on sentencing, we recognize these as tactical decisions. We will not second-guess them. We also note the impressive credentials civilian counsel filed with this court, attached to his affidavit. But he has provided no

reasonable explanation why no efforts were made to rebut SA Lanning's devastating testimony. We characterize the testimony as devastating based upon our own review of it. But that evaluation is bolstered by the comments of the detailed defense counsel's clemency request, wherein he writes:

> After the trial, the prosecutor and I talked to the military judge about how he arrived at his sentence with regards to confinement. He responded that the F.B.I. profiler had provided a picture of a pedophile and that the only way to keep such persons out of society was by shelving them, in other words, by sending them to jail as long as possible.

Clemency Request at 6-7.

Given the evidence the appellant has presented on this aspect of his allegation, we hold that he has overcome the presumption that his counsel provided him with effective assistance. Nor for that matter did counsel even offer a reasonable explanation concerning his failure to offer rebuttal evidence to the testimony of SA Lanning. We turn then to the issue of prejudice. In evaluating that issue we have considered the devastating effectiveness of SA Lanning's testimony. We have considered the ineffectual cross-examination of SA Lanning, suggestive of inadequate preparation for his testimony. And given the comments of the detailed defense counsel in the Clemency Request of 2 August 2000, the ineffectual cross-examination is more likely than not a result of inadequate preparation for that witness. We have considered the willingness of Dr. Miller to testify in rebuttal to SA Lanning's testimony, the probable content of that rebuttal, and the fact that he was not even asked to testify. *See United States v. Clark*, 49 M.J. 98, 100 (C.A.A.F. 1998). In evaluating these considerations we have not looked at the success or failure of counsel's trial strategy, but rather whether counsel "made an objectively reasonable choice in strategy from the alternatives available at the time." *Dewrell*, 55 M.J. at 136 (quoting *Hughes*, 48 M.J. at 718). We conclude that he did not.

Accordingly, we conclude that the appellant has also carried his burden of establishing prejudicial error. We, therefore, hold that counsel's deficient performance during the sentencing phase of the appellant's court-martial renders the results of the sentencing hearing either "unreliable" or "fundamentally unfair." *See Ingham*, 42 M.J. at 223 (quoting *Fretwell*, 506 U.S. at 372). We shall take corrective action.

Speedy Review

In his third assignment of error, the appellant argues that his punitive discharge should be set aside because it took 17 months from the date of trial for the convening authority to take

action in this case. While our corrective action with respect to the assignment of error alleging ineffective assistance of counsel moots the requested relief, we find that other relief is appropriate.

In *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), our superior court made clear that we are "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." Although we normally require some showing of prejudice before granting relief for post-trial delay, *United States v. Khamsouk*, 58 M.J. 560, 561-62 (N.M.Ct.Crim.App. 2003), we are not required to do so. We may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *Tardif*, 57 M.J. at 225.

In this case the appellant did not specifically ask for speedy review. He did, however, seek relief shortly after trial based upon his allegation that he was denied effective assistance of counsel. More than a year later the staff judge advocate (SJA) advised the CA that he did not agree with the appellant's claim that he did not receive effective assistance of counsel, and recommended no corrective action. Staff Judge Advocate's Recommendation of 22 Aug 2001 at 3. We have examined exactly the same evidence available to the SJA and the CA, and have found merit to the appellant's claim. The appellant's meritorious claim could have been addressed shortly after it was made. Instead, he has had to wait four and a half years for relief. In tailoring an appropriate remedy it is appropriate that we consider those factors, as well as the old adage, "justice delayed is justice denied." Accordingly, we will order the dismissal of Specifications 2 and 3 of Charge II, rather than authorizing a rehearing on those offenses.

Conclusion

The findings of guilty to Specifications 2 and 3 of Charge II are set aside and those Specifications are dismissed. We affirm the remaining findings of guilty. The sentence is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate CA who may order a sentencing rehearing. If a rehearing on sentencing is impractical, the CA may approve a sentence of no punishment.

Upon completion of the new post-trial action, the record will then be returned to this court for completion of appellate review.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court