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

**BEFORE**

**Charles Wm. DORMAN** **C.A. PRICE** **R.C. HARRIS**

**UNITED STATES**

**v.**

**James N. BINGHAM**
**Corporal (E-4), U.S. Marine Corps**

NMCCA 200200443 Decided 27 May 2005

Sentence adjudged 12 October 2000. Military Judge: R.K. Fricke. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT DONALD L. PALMER, JAGC, USNR, Appellate Government Counsel
CAPT THOMAS DEMAY, JAGC, USNR, Appellate Government Counsel



HARRIS, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of murdering his 1½-year-old daughter Mollie, by commission of inherently dangerous acts, in violation of Article 118(3), Uniform Code of Military Justice, 10 U.S.C. § 918(3). The military judge sentenced the appellant to 35 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed. As required by the terms of the pretrial agreement, the convening authority suspended all confinement in excess of 18 years for a period of 36 months from the date of his action.

The appellant argues that the military judge was prejudiced by the presentencing argument of the trial counsel, which supposedly encouraged the military judge to stand in the shoes of the young victim. The appellant further contends that excessive and inordinate Government delay deprived him of his right to a

speedy post-trial review. After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and the 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.

**Improper Sentencing Argument**

In the appellant's first assignment of error, he contends that the trial counsel delivered an improper sentencing argument. The appellant avers that this court should set aside the sentence and remand his case to the convening authority for a rehearing on sentence. We disagree.

The appellant's position focuses on the following statements of the trial counsel:

> What is that little girl who is no longer with us worth . . . . What was it worth the first time that Mollie Bingham ever rode a bicycle? What was it worth the first time that little girl put on a Brownie uniform? What was it worth the first time that Mollie Bingham did something that made her parents proud and she could see the look of pride in their eyes? Her first report card? Her first puppy love? Her own wedding some day? Her own children?

Record at 322. Specifically, the appellant contends that the trial counsel's asking the military judge to question what the dead child's life was worth amounted to encouraging the judge to stand in the shoes of the victim. We again disagree.

Inasmuch as the appellant failed to make an objection at trial, in the absence of plain error he is entitled to no relief. RULE FOR COURTS-MARITAL 1001(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Evans*, 35 M.J. 351, 354 (C.M.A. 1992). "Plain error" as a legal term requires that an error, in fact, exist; that it be plain or obvious; and that it materially prejudiced the substantial rights of the appellant. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). When plain error involves a judge alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, and is presumed capable of filtering out inadmissible evidence and inappropriate arguments. *Id*. As such, "plain error before a military judge sitting alone is rare indeed." *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996).

In *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000), our superior court considered a case where the trial counsel asked the members during his sentencing argument to "imagine" the victim entering the house where she was savagely beaten by Baer and his cohorts. Moments later, the members were invited to

"imagine the pain and the agony. Imagine the helplessness and the terror. . . ." *Id*. at 237. The *Baer* court began with a reminder that when arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul blows. *United States v. Edwards*, 35 MJ 351 (C.M.A. 1992); *see also Berger v. United States*, 295 U.S. 78 (1935). Among the foulest of blows is an argument aimed at inflaming the passions or prejudices of the court members. *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). One means of inciting such prejudices is to encourage the members or the military judge to place themselves in the shoes of the victim.

On the other hand, the trial counsel is permitted to ask the sentencing authority to consider victim impact evidence. Such evidence may include, among other matters, asking the military judge to imagine the victim's fear, pain, terror, and anguish. *Baer*, 53 M.J. at 238 (citing *United States v. Holt*, 33 M.J. 400, 408-09 (C.M.A. 1991)). Victim impact evidence also includes asking the sentencing authority to take into account that the victim will be deprived of the "joys, sorrows, dreams, and hopes one would go through in a lifetime." *United States v. Thomas*, 43 M.J. 550, 598-99 (N.M.Ct.Crim.App. 1995), *rev'd in part on other grounds*, 46 M.J. 311 (C.A.A.F. 1997). From a logical standpoint, inviting the sentencing authority to consider the fear and pain of the victim, as well as the loss of one's opportunity to live life to the fullest, are conceptually different from asking him to stand in the victim's place. *See United States v. Edmonds*, 36 M.J. 791, 793 (A.C.M.R. 1993).

In the case at bar, little Mollie Bingham lies dead at the hands of the appellant. Because of his actions, this child will indeed never grow and experience all the joys and sorrows of life. There can be no greater impact to the victim than taking that which all of us hold most dear, life itself. Evaluating the trial counsel's entire sentencing argument in context, we find no indication that the direction, tone, and theme of the argument were calculated to inflame the military judge's passions or possible prejudices. *Baer*, 53 M.J. at 238. Instead, trial counsel was describing the unfortunate consequences of Mollie Bingham's tragic demise. Such circumstances were appropriate considerations bearing upon the sentence to be awarded.

With respect to the trial counsel's sentencing argument, we find no error, plain or otherwise. Moreover, had we actually found a plain or obvious error, we cannot imagine how the trial counsel's argument could have rendered the military judge biased against the appellant. In short, even if this argument amounted to an error, we conclude that the appellant suffered no prejudice. Therefore, we decline to grant relief.

**Speedy Post-Trial Review**

In the appellant's second assignment of error, he summarily asserts that he was denied speedy post-trial due process because of excessive and inordinate Government delay. The appellant avers that this court should reassess the sentence, affirming only so much of the sentence as provides for a bad-conduct discharge. We disagree.

Regardless of the nature of the offense committed, speedy post-trial review is a right afforded all service members punished during court-martial proceedings. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). As a court, we have consistently decried post-trial delays and strived to hold convening authorities accountable for foot-dragging. *United States v. Williams*, 42 M.J. 791, 794 (N.M.Ct.Crim.App. 1995); *United States v. Henry*, 40 M.J. 722, 725 (N.M.Ct.Crim.App. 1994)(noting that this court cannot condone "such dilatory and slipshod practices"). Our efforts in this regard stem from the broad power and responsibility we possess to protect an accused. *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). Recognizing that, as addressed in *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003), every military appellant has a statutory and due process right to timely appellate review,[1] we are also cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Our consideration of whether a given sentence is warranted, including any off-shoot issues growing from an assertion of unreasonable post-trial delay, traditionally required us to affirm only so much of the sentence as we found justified by the whole record, and to set aside all or part of the sentence either because it is illegal or inappropriate. *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957)(discussing Art. 66(c), UCMJ). This authority, however, especially in the post-trial delay arena, was generally viewed as limited by the Article 59(a), UCMJ, mandate that relief only be afforded where an error of law materially prejudiced a substantial right of the accused. *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993); *United States v. Banks*, 7 M.J. 92, 94 (C.M.A. 1979).

Our superior court's decision in *Tardif*, however, marked a significant shift in how allegations of unreasonable post-trial delay are now analyzed by military courts of criminal appeals. Such assignments of error are now measured against two

[1] An "[appellant's] right to a full and fair review of his findings and sentence under Article 66[(c), UCMJ,] embodies a concomitant right to have that review conducted in a timely fashion. Additionally, [an appellant] has a constitutional right to a timely review guaranteed him under the Due Process Clause." *Diaz*, 59 M.J. at 37-38.

independent statutory standards, Articles 59(a) and 66(c), UCMJ, which in turn spawn a three-prong inquiry.

First, we are required to determine whether the post-trial delay complained of renders the findings and/or sentence incorrect as a matter of law. *Tardif*, 57 M.J. at 219; *see* Art. 59(a), UCMJ. This particular prong of the analysis is bracketed, however, by the statutory constraint that relief is only appropriate where the error "materially prejudices the substantial rights of the accused." Art. 59(a), UCMJ; *Tardif*, 57 M.J. at 219. Second, we will consider whether the delay leaves the findings and/or sentence incorrect from a factual standpoint. *Tardif*, 57 M.J. at 219; *see* Art. 66(c), UCMJ. Third, even if the first two prongs of the analysis run against the appellant, we must nevertheless review the allegation of unreasonable post-trial delay in light of the entire record to determine whether the findings or sentence should be approved. *Tardif*, 57 M.J. at 219; *see* Art. 66(c), UCMJ. Unlike the first prong of the test, the second and third parts of the analysis do not require a showing of prejudice by the appellant. *Tardif*, 57 M.J. at 219.

Nonetheless, where post-trial delay is determined to be excessive and unexplained, we must decide whether the unexplained delay is "facially unreasonable." *See United States v. Jones*, ___ M.J. ___, No. 02-0060, slip op. at 8 (C.A.A.F. May 10, 2005). If we find unexplained delay to be facially unreasonable, this triggers a due process review under *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See Jones*, slip op. at 8-9 (applying the following factors to determine whether the appellant's due process rights have been violated: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of the right to timely appellate review; and (4) the resulting prejudice to the appellant from the delay). In *Jones*, the Court of Appeals for the Armed Forces, after applying the four *Barker v. Wingo* due process review factors to the timeliness of the post-trial and appellate processing of the appellant's case, found that the unreasonably lengthy and unexplained delay prejudiced the appellant as a matter of law. *Id*. at 15. Key to our superior court's finding of prejudice to the appellant was its determination that the appellant demonstrated "ongoing prejudice." *Id*. at 12.

Review of the *Jones* case leads us to conclude that where the length of delay is so short that it is determined to be facially reasonable, the rest of the analysis under *Barker v. Wingo* is unnecessary. *Id*. at 9 (quoting *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If 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*. Nonetheless, where the length of delay is determined to be facially unreasonable, the reasons for the delay, or the absence of demand for speedy review, or the absence of prejudice to the appellant can make the delay reasonable under the particular circumstances

of that appellant's case. Only where the delay is determined to be extreme would there be a presumption of prejudice, even in the absence of actual prejudice. Review of the appellant's case leads us to conclude that the post-trial delay in this case is clearly not extreme. Therefore, there is no presumption of prejudice.

When viewed from sentencing of the appellant until the docketing of his 384-page, multi-volume record of trial with an extensive exhibit list, the unexplained post-trial delay in the appellant's case is not excessive. Further, we do not find any prejudice or other harm to the appellant resulting from the unexplained delay, nor do we conclude that it affects the "findings and sentence [that] *'should be approved,'* based on all the facts and circumstances reflected in the record. . . ." *Tardif*, 57 M.J. at 224 (emphasis added). The convening authority carefully considered the appellant's extensive request for clemency upon receipt and acted on it in a timely manner. Moreover, the appellant never complained to the military judge, staff judge advocate, or convening authority about any delay. As such, we do not find the unexplained delay between the appellant's trial and the convening authority's action to be excessive. We also do not find the unexplained time that it took to docket the appellant's case with this court for appellate review to be excessive, nor do we find the time from docketing to this court's opinion to be excessive. Despite the appellant's complaint that the length of time is sufficient to warrant relief, he has not alleged, nor do we find, any indication of deliberate or malicious intent as a reason for the unexplained delay in this case. *See United States v. Toohey*, 60 M.J. 703, 708 (N.M.Ct.Crim.App. 2004).

While we implore convening authorities to make every possible effort to conduct timely post-trial reviews, we find the unexplained delay in this case neither unreasonable nor jeopardizing the findings and/or the sentence as a matter of law. *Tardif*, 57 M.J. at 219. Even if the delay, in and of itself, had raised questions concerning the legality of the findings and/or the sentence, we can find no prejudice to the appellant, much less an allegation that such prejudice actually befell him. Art. 59(a), UCMJ; *Tardif*, 57 M.J. at 219. Relief pursuant to Article 66(c), UCMJ, should only be granted under the most extraordinary of circumstances. *Toohey*, 60 M.J. at 710; *see also* Art. 59(a), UCMJ. While we do not condone lengthy delay in any case, we conclude that there is nothing so extraordinary about the appellant's case that merits the exercise of our powers under Article 66(c), UCMJ. *Toohey*, 60 M.J. at 708. Additionally, we conclude that there has been no due process violation due to the post-trial delay. *See Jones*, slip op. at 15; *Toohey*, 60 M.J. at 103; *Diaz*, 59 M.J. at 37; *Tardif*, 57 M.J. at 224; *see also United States v. Diaz*, ___ M.J. ___, No. 200200374 (N.M.Ct.Crim.App. 23 March 2005). Finally, in light of the

entire record, we find no basis on which to disturb the findings and/or the sentence. Therefore, we decline to grant relief.

**Conclusion**

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court