

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**David A. DEARMOND  
Hull Maintenance Technician Second Class (E-5), U.S. Navy**

NMCCA 200501343

Decided 31 May 2007

Sentence adjudged 9 June 2003. Military Judge: D.M. Hinkley.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel  
Maj KEVIN HARRIS, USMC, Appellate Government Counsel  
MS. JACQUELINE PHILLIPS, Amicus Curiae Brief

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of unpremeditated murder, voluntary manslaughter, and abusing a corpse in violation of Articles 118, 119, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 919, and 934. The appellant was sentenced by officer and enlisted members to confinement for 270 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

On appeal, the appellant raises eight assignments of error.<sup>1</sup> We have examined the record of trial, the appellant's assignments

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<sup>1</sup> I - the trial defense counsel improperly severed their attorney-client relationships with the appellant without being properly released;  
II - the military judge abused his discretion by admitting photographs of corpses that did not contribute to the resolution of any contested issue;  
III - the military judge applied the wrong standard when he admitted testimony from the appellant's neighbor that she wanted to move and inappropriately considered the neighbor to be a victim;

of error, the Government's response, and the appellant's reply. 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.<sup>2</sup>

### **Improper Severance of Attorney-Client Relationship**

The appellant asserts that his individual military counsel (IMC) and his two detailed trial defense counsel improperly severed their attorney-client relationships with the appellant denying him effective post-trial representation. We disagree. The following events and dates are relevant to the appellant's claim. The facts asserted herein are uncontested.

9 June 2003: The appellant was sentenced by officer and enlisted members and was subsequently confined at the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas.

19 January 2004: The appellant utilized USDB procedures to identify his appellate defense counsel. He was informed that he was still represented by his trial defense team. The appellant made no requests to contact his trial defense team for the next seven months.

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IV - the appellant's pleas to unpremeditated murder and voluntary manslaughter were improvident where evidence was introduced that self-defense was present at the time of the offenses;

V - post-trial delay;

VI - the convening authority abused his discretion when he denied the appellant's request for an expert consultant in mitigation and an independent investigator before the appellant elected to enter into a pretrial agreement (*Grostefon*);

VII - the trial defense counsel were ineffective in representing the appellant at the sentencing state of the trial (*Grostefon*); and

VIII - a sentence including confinement for 22.5 years, a dishonorable discharge, and total forfeitures was inappropriately severe (*Grostefon*).

<sup>2</sup> Although we agree with counsel's decision not to raise this as an assignment of error, we note that Defense Exhibit QQQ (videotape of sentencing testimony of Barbara Clem) is missing from the record. Record at 756-57. A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). If an omission from the record of trial is substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979). We find that the absence of defense sentencing exhibit QQQ is not substantial and therefore does not raise a presumption of prejudice.

2 August - 2 December 2004: The appellant used USDB special request procedures on at least five separate occasions to request contact with a member of his trial defense team. It appears that at least one telephonic contact might have been made between the appellant and one of his detailed defense counsel but the record is ambiguous.

20 August 2004: The record of trial comprising 1761 pages of transcript and an additional 11 volumes of exhibits was authenticated by the military judge.

16 November 2004: The staff judge advocate's recommendation (SJAR) was issued.

19 November 2004: The IMC acknowledged receipt of the SJAR.

22 November 2004: The IMC requested and was granted an additional 20 days to respond to the SJAR, making the appellant's response due by 20 December 2004.

13 December 2004: The appellant and his IMC telephonically discussed post-trial matters. During the conversation, the appellant stated that he believed he was receiving ineffective post-trial assistance from his trial defense team. The IMC discussed various options with the appellant and agreed to send the appellant a form he could use to request new counsel. The IMC states that he concluded the conversation with the impression that the appellant believed his IMC and detailed trial defense counsel had provided ineffective post-trial representation and that the appellant wanted new counsel assigned. The appellant states that he concluded the conversation with the understanding that the IMC would forward him a form he could use to request new counsel but that his current defense team would continue to represent him in the interim.

15 December 2004: The IMC submitted a letter to the CA indicating that the appellant no longer wished the IMC and the appellant's two detailed defense counsel to represent him. The IMC requested that the three attorneys be relieved of all duties relative to the appellant's case and that new counsel be assigned.

6 January 2005: The CA notified the Naval Legal Service Office, Pacific, Detachment (NLSO PAC Det.), Pearl Harbor, of the IMC's letter and assertions and requested assignment of new counsel.

11 January 2005: The NLSO PAC Det. responded to the CA that new counsel could not be assigned until the IMC was "properly relieved."

11 February 2005: The appellant faxed a personal letter to the convening authority asking that his IMC and two detailed defense counsel be relieved and that new counsel be assigned.

2 March 2005: NLSO, Pacific notified the CA by letter that substitute defense counsel (SDC) had been assigned and directed to work with the IMC until such time as "appropriate authority releases (the IMC) from further representational duties." The SDC was stationed in Sasebo, Japan. The record suggests that by this time the IMC had transferred to an operational billet, but the location was unclear.

10-13 April 2005: The SDC exchanged e-mails with the Appellate Defense Division, Office of the Judge Advocate General, Code 45, where an appellate defense attorney was assigned to coordinate with the appellant's SDC regarding post-trial matters.

28 April 2005: The SDC requested and received funding from the CA to travel to Ft. Leavenworth to establish an attorney-client relationship with the appellant.

9 May 2005: The SDC acknowledged receipt of SJAR dated 16 November 2004.

10 May 2005: The SDC acknowledged receipt of the 18-volume record of trial and requested a 20-day extension to file clemency matters. The request indicated that the SDC had not been able to contact any members of the appellant's trial defense team.

12 May 2005: The CA granted the requested 20-day extension which, although not expressly stated in either the request or the response letters, appears to extend until on or about 9 June 2005.

16-28 May 2005: The SDC traveled to Ft. Leavenworth and established an attorney-client relationship with the appellant.

9 June 2005: The SDC submitted an extensive 29-page clemency petition with numerous attachments to the CA on behalf of the appellant. The clemency petition specifically characterized the IMC's actions as an "abandonment" of the appellant.

29 July 2005: An SJAR Addendum was issued.

29 August 2005: The CA's action was issued.

27 September 2006: The SDC executed a sworn affidavit in which he asserted that he had been unable to reach any of the appellant's trial defense team prior to submitting the

appellant's 9 June 2005 clemency petition. He further asserted NLSO PAC Det. was unable to provide location information for any of the attorneys and the Judge Advocate General's Directory of Judge Advocates had not been updated with current location information for the attorneys. The SDC did not, however, indicate that he requested or needed any additional time to submit clemency matters.

### Discussion

It appears from the chronology above that the authorities that detailed the IMC and the two detailed trial defense counsel did not formally relieve them of responsibility for the appellant's case until sometime after the appellant's 11 February 2005 written request that his defense team be relieved and that new counsel be appointed.<sup>3</sup> Thus, while the appellant styles this assignment of error as an improper severance of his attorney-client relationship, it appears the gravamen of his complaint is that his trial defense team became ineffective when they allegedly stopped working on his behalf shortly after his 13 December 2004 telephone conversation with the IMC. We will analyze this assignment of error as an assertion of ineffective assistance of counsel.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. The 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)). We conclude that while the appellant has demonstrated deficient performance by his trial defense team during the period between sentencing and the CA's action, he has not demonstrated prejudice.

An accused must be afforded legal representation at all critical stages of criminal proceedings. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977). It is settled law that the appeals process is one such critical stage. *Swenson v. Bosler*, 386 U.S. 258 (1967). While our superior court has required that there be "no gap" in an appellant's representation between the

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<sup>3</sup> It is unclear from the record precisely when the IMC and detailed trial defense counsel were relieved. We note, however, that the IMC's 15 December 2004 letter formally requesting relief suggests an understanding that they were still assigned as the appellant's counsel. Further, the NLSO, Pacific letter of 2 March 2005 expressly directs the SDC to work with the IMC until such time as "appropriate authority releases" him from further defense duties. We are, therefore, satisfied that the trial defense team understood that they remained part of the appellant's defense team until relieved by proper authority.

end of trial and the time the convening authority acts,<sup>4</sup> we do not understand this to mean that there must be unbroken day to day representation. Rather, we hold that an appellant must have adequate legal representation during each stage of the proceedings, to include the post-trial stage between sentencing and the convening authority's action.<sup>5</sup>

In *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995), our superior court considered a case in many ways similar to the one at bar. In *Cornelious*, the appellant informed his defense counsel that he was dissatisfied with his legal representation. The court held that once aware of such dissatisfaction, the defense counsel was obligated to advise the client of the consequences of terminating the attorney-client relationship and determine if the client is merely frustrated or actually wants to discharge the attorney. If the latter, the attorney should "notify the appropriate authority and no longer act on appellant's behalf." *Id.* at 398 (quoting *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994)).

In the instant case, the appellant acknowledges that he expressed significant dissatisfaction with his trial defense team's post-trial representation during his 13 December 2004 telephone discussion with his IMC. It also appears that his IMC discussed the appellant's specific concerns and outlined the appellant's options, to include requesting relief for the IMC and the two detailed trial defense counsel. While there is some disagreement whether the IMC promised to continue representation until such time as a SDC was assigned, this need not detain us. Whether or not the IMC promised to continue to work on the appellant's behalf, both he and the two detailed trial defense counsel were ethically obligated to continue to function as members of the appellant's defense team and to render the appellant such advice and assistance as the exigencies of the particular case might require until such time as they were relieved by proper authority. *Palenius*, 2 M.J. at 93.

The salient question is what assistance the trial defense team ethically could and should have provided after they were made aware that the appellant believed they were ineffective during the post-trial period. A very narrow reading of *Cornelious* might appear at first blush to indicate that once a counsel has been informed that his client is accusing him of ineffective assistance he can do nothing further on behalf of the

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<sup>4</sup> *Palenius*, 2 M.J. at 93.

<sup>5</sup> To hold otherwise would elevate form over substance. It would, for example, be error when a detailed defense counsel becomes unavailable to continue representation due to unanticipated medical or other emergency situations. In such cases even the most aggressive efforts to assign substitute defense counsel would still result in at least a day or two gap in representation. See *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994)(trial defense counsel suffering from post-operative effects of surgery).

client. *Cornelious*, 41 M.J. at 398. Such a narrow reading of *Cornelious* is, however, inconsistent with an attorney's continuing ethical obligations under the Rules of Professional Responsibility.

The Rules of Professional Responsibility applicable to attorneys practicing under the cognizance of the Judge Advocate General of the Navy provide in pertinent part that "unless the relationship is terminated... a covered attorney should carry through to conclusion all matters undertaken for a client... [d]oubt about whether an attorney-client relationship continues to exist should be clarified by the covered attorney, preferably in writing, so that the client will not mistakenly suppose the attorney is looking after the client's affairs when the attorney has ceased to do so."<sup>6</sup>

In the instant case, the IMC and the two detailed trial defense counsel were prohibited under the conflict of interest rules articulated in *Cornelious* from filing a clemency petition, reviewing the record of trial on behalf of the appellant, or from otherwise actively acting on his behalf in regards to the substance of the case. They continued, however, to be obligated under the Rules of Professional Conduct to actively pursue getting an SDC assigned to the appellant, to actively coordinate with the SDC, and to affirmatively turn over all work done and information collected to date on the appellant's behalf. It was in this duty that we find the IMC and the two detailed trial defense counsel were deficient.

Beyond notifying the convening authority<sup>7</sup> of the appellant's assertion of ineffective assistance of counsel, the record reflects no efforts by any of the trial defense team to expedite the assignment of a SDC or to provide their trial knowledge and case-expertise to the SDC once he was assigned. Following what can best be characterized as the leisurely and unhurried approach taken by the convening authority, NLSO Pacific, and personnel at the USDB to assist the appellant in obtaining new counsel, the SDC states that he was unable to locate any of the original trial defense team. According to the SDC's affidavit, he consulted NLSO, Detachment Pacific, OJAG Appellate Defense, and the official directory of Navy attorneys without being able to locate any of the three attorneys. While we find it difficult to fathom that the various defense organizations were unable to assist in

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<sup>6</sup> Judge Advocate General Instruction 5803.1C dated 9 Nov 2004, Rule 1.3 (Diligence), Comment (3).

<sup>7</sup> We note that the convening authority is not listed as an authority authorized to detail or relieve counsel under R.C.M. 505. The IMC should properly have notified his own chain of command and the NLSO PAC chain of command responsible for assigning the detailed counsel. The convening authority partially remedied this error by forwarding the IMC's 15 December 2004 letter to the OIC, NLSO Detachment Pacific on 6 January 2005.

locating the three members of the trial defense team, the Government offers nothing to refute the SDC's assertion.

The appellant's frustration with the slow processing of his requests for legal advice within the USDB system and his sense of abandonment when his trial defense team failed to communicate with him on a more consistent basis is understandable. The applicable Rule of Professional Responsibility requires counsel to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." JAGINST 5803.1C, Rule 1.4. It appears this was not done in this case. We find, therefore, that the performance of the IMC and the detailed trial defense counsel was deficient following the appellant's 13 December 2004 telephone conversation with his IMC, when they failed to actively pursue getting an SDC assigned to the appellant, to actively coordinate with the SDC, and to affirmatively turn over all work done and information collected on the appellant's behalf. We now consider whether the deficient representation between the IMC's 15 December 2004 notification to the CA and the 2 March 2005 assignment of an SDC prejudiced the appellant.

The SDC received the record of trial and the SJAR on 9-10 May 2005. The SDC's uncontroverted affidavit indicated that he was unsuccessful in attempts to contact any member of the trial defense team prior to submitting his 29-page clemency petition to the CA on 9 June 2005. We note that, upon request, the CA funded the SDC's trip to the USDB to establish an attorney-client relationship with the appellant and that the CA granted the SDC's request for a 20-day extension of time to file clemency matters. While the SDC was unable to contact any members of the original trial defense team, there is no evidence the SDC requested or needed additional time to complete the appellant's clemency petition.

Where, as in the instant case, there is a gap in effective legal representation of an appellant during a critical post-trial period, we examine whether subsequently afforded counsel was able to make up for the earlier deprivation. *United States v. Leaver*, 36 M.J. 133, 136 (C.M.A. 1992). We recognize that no one is more familiar with the record of trial and the factual and legal issues than the attorneys who represented an accused at trial. *United States v. Morgan*, 62 M.J. 631 (N.M.Ct.Crim. App. 2006). While the SDC could certainly have benefited from consultations with one or more members of the trial defense team, he was nonetheless able to draft and submit a strong clemency petition on behalf of the appellant. As noted by the Government, the witnesses the SDC was unable to contact had already testified favorably to the appellant at trial. Finally, we observe that considering the serious nature of the offenses, the appellant's sentence was exceptionally light. In fact, the sentence awarded by the members was seven and one-half years less than that

provided for in the pretrial agreement.<sup>8</sup> We find, therefore, that the SDC was able to make up for the appellant's earlier deprivation of effective counsel and that consequently, the appellant suffered no prejudice.

### Post-Trial Delay

We are aware, as the appellant contends, that nearly four years have passed since he was sentenced. We consider four factors in determining if post-trial delay violates an appellant's due process rights: (1) length of the delay; (2) 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)(*Toohey I*)). The 18-volume record of trial in this case unquestionably required reasonable additional time and effort by personnel at every step in the process. While the CA's action includes a timeline detailing the slow post-trial progression of this case, we find that an 812 day delay between sentencing and the CA's action was unreasonable even in light of the extensive record.

We concur with the Government's assessment that the appellant has suffered no specific prejudice from this delay. What is apparent, however, is a "delay so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)(*Toohey II*). While it is impossible to point a finger at a particular individual or command, we are particularly troubled by the fact that it took nearly 4 months to simply provide the appellant with an SDC and another 2 months to bring them face-to-face. We conclude that, despite the fact that the appellant has failed to show specific prejudice, taking almost four years to docket this record of trial works to diminish the public's perception of the fairness and integrity of the military justice system. Therefore, our consideration of the four factors announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), leads us to conclude that the appellant was denied his due process right to speedy review and appeal.

"Having found a due process violation, we now test for harm and prejudice." *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006)(citing *United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006)). As noted above, there is no evidence of any specific harm resulting from the delay. There is no appellate issue that would afford the appellant relief and no oppressive incarceration resulting from the delay. Contrary to the appellant's assertion, we find no particularized anxiety caused by the delay and no rehearing has been ordered which might be impacted by excessive post-trial delay. *See id.* Thus, we

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<sup>8</sup> The pretrial agreement capped confinement at 30 years. The appellant was awarded 22.5 years confinement.

conclude that the appellant has not suffered any prejudice resulting from the delay in his case. As we find that the appellant has not suffered specific prejudice, we hold that the error in processing this case was harmless beyond a reasonable doubt.

This does not end our inquiry. We continue to examine the issue of post-trial delay pursuant to the authority contained in Article 66(c), UCMJ, in light of our superior court's guidance in *Toohy I*, 60 M.J. at 101-02 and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). The facts in this case demonstrate an extreme lack of professional oversight of the post-trial process. The inappropriately leisurely post-trial processing of this case by all concerned must be balanced against all of the factors in the record before us, including the crimes of which the appellant stands convicted, that portion of the appellant's military record entered into evidence, and the sentence approved by the CA. Having done so, we conclude that given the extremely light sentence the appellant received for killing his wife and mother-in-law, any meaningful relief would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. Therefore, we find that the delay in this case does not affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

### Conclusion

The appellant's remaining assignments of error are without merit. The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL  
Clerk of Court