UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MICHAEL J. BLUME
United States Air Force

ACM 37385

23 March 2012

Sentence adjudged 18 December 2008 by GCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Dismissal and confinement for 30 months.

Appellate Counsel for the Appellant: Frank J. Spinner, Esquire (civilian counsel) (argued); Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Michael A. Burnat; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Major Joseph Kubler (argued); Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, WEISS, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

ORR, Chief Judge:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of wrongful possession of child pornography, one specification of writing and publishing for public viewing on the internet a narrative description of minors engaged in sexually explicit conduct, and one specification of wrongful distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C.

§ 934. The adjudged sentence consisted of a dismissal and confinement for 3 years. In accordance with a pretrial agreement (PTA), the convening authority approved the adjudged dismissal and reduced the length of confinement to 30 months. The appellant raises five issues for our consideration: 1) whether writing and posting a fictitious account of minors engaging in sexually explicit conduct, for the purpose of identifying and reporting to law enforcement agencies individuals engaged in actual sexual molestation and illegal child pornography offenses, violates Article 134, UCMJ; 2) whether trial defense counsel were ineffective by misadvising the appellant concerning whether he possessed a defense to the charges and specifications; 3) whether trial defense counsel were ineffective by misadvising the appellant on whether he would have to register as a sex offender if he pled guilty to the charges and specifications; 4) whether trial defense counsel were ineffective by misadvising him on whether he would receive parole at the first opportunity if he pled guilty to the charges and specifications; and 5) whether trial defense counsel were ineffective by failing to procure the services of expert consultants in the fields of forensic computer analysis and psychology. We heard oral argument on the assignments of error relating to the appellant's ineffective assistance of counsel claims. After considering the record of trial and counsels' briefs and arguments, we find no error that materially prejudices a substantial right of the appellant, and we thus affirm.

Background

The appellant was a pilot serving as an Air Mobility Liaison Officer stationed at Fort Carson, Colorado. In October of 2003, the appellant began searching online for child pornography. He used Google and Yahoo! search engines and entered key words such as "pre-teen" to look for images showing the genitals or pubic area of children under 18 years of age or minors engaged in sexually explicit acts. Between March 2007 and September 2007, the appellant routinely chatted with people online via Yahoo! He utilized the screen name of "ptkahn2000" on various forums oriented toward pedophilia. The "pt" in his user name stands for pre-teen. The appellant chatted about how he lost most of his child pornography pictures when his computer's hard drive crashed and his desire to engage in sexual activity with his neighbor's young daughters.

In August of 2007, the appellant wrote a seven-page story entitled "Sam's School for Girls" and published it on a website called "Perverts R Us." The story describes a man named Sam, who was previously an Air Force maintenance officer at McGuire Air Force Base until he won the lottery. Sam then bought a school and purchased children from their parents to attend his school. Sam then describes how he would teach children ages 10-18 how to engage in sexual activity, including oral, anal, and vaginal sex. The appellant then posted the story under the writer's name of "Yeti" which is a nickname that his friends and co-workers called him. He then encouraged the people who read his story to send him their comments. The headnote to the story reads as follows: "Please send any comments to PTKahn2001@yahoo.com. All suggestions are welcome, or just

say hi." Periodically, individuals who read his story would send him pictures of minors engaged in sexual activity.

On or about 1 August 2007, the appellant uploaded 45 images onto his Yahoo! Photo account. On 8 August 2007, Yahoo! reported the appellant's activity to the National Center for Missing and Exploited Children (NCMEC), because they believed that the images contained child pornography. On 26 August 2007, Yahoo! made a second report to NCMEC concerning 46 images the appellant uploaded on 1 August 2007 that Yahoo! believed to contain child pornography. On or about 4 August 2007, the appellant uploaded 15 images to his Photobucket website under the name of ptkahn2000. Believing that the images contained child pornography, Photobucket reported the activity to NCMEC. In late August 2007, Yahoo!, who also operates the Photobucket website, deactivated the appellant's accounts because of suspicious activity.

On 14 September 2007, the Colorado Springs Internet Crimes Task Force obtained a search warrant for the appellant's home. They seized computer evidence and sent it to the Defense Computer Forensics Laboratory (DCFL) for analysis. The DCFL experts determined that the appellant's computer files contained images of known child victims from the following NCMEC series: "Felisha," "Jan_Feb," "KG-Inga," "Leaf," "Sabban," and "Vicki." Some of the images were taken between 2002 and June 2003 of a female who was 6-7 years old. Other files contain images taken in the mid-1990's of boys and a girl between the ages of 8 and 12. Many of the images recovered showed children with exposed genitalia or engaged in sexually explicit activities. Although the appellant claims that he sent tips over a five-year period to law enforcement agencies, including the Federal Bureau of Investigation (FBI), beginning in 2002, the FBI was only able to find three tips submitted by the appellant during 2007. All three of those tips were submitted to the FBI after Yahoo! shut down the appellant's accounts. After learning of the FBI's initial search results, the appellant's defense counsel asked the FBI to search their records beginning in 2002. After an expansive search covering a five-year period using information supplied by the appellant, the FBI did not find any additional tips originated by the appellant.

Sufficiency of Article 134, UCMJ, Plea

1. LAW

In his first assignment of error, the appellant asserts that Specification 2 of the Charge does not violate Article 134, UCMJ. We review for an abuse of discretion a military judge's decision to accept or reject an accused's guilty plea. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008).

Under Article 134, UCMJ, the Government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was: (1) to the prejudice of good order and discipline; (2) of a nature to bring discredit upon the armed forces; or (3) a crime or offense not capital. *See* Article 134, UCMJ.

2. DISCUSSION

At trial, the appellant pled guilty to Specification 2 of the Charge, which reads as follows:

> In that [the appellant] did, within the continental United States, on or about 1 August 2007, wrongfully and knowingly write and publish for public viewing on the internet website […/Stories/Yeti] a narrative describing minors engaging in sexually explicit conduct, which conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

During the providence inquiry, the appellant stated that his purpose in writing and publishing the story was to attempt to identify child abusers and report them to law enforcement.

The appellant admits that he engaged in the alleged conduct and acknowledges that the text of the charge and specification states an offense. He now argues, however, that his plea was improvident because writing and posting a fictitious account of minors engaging in sexually explicit conduct *for the purpose of identifying and reporting to law enforcement agencies individuals engaged in actual sexual molestation and illegal child pornography* negates the terminal element of Article 134, UCMJ. He avers that because his motivation for writing and publishing the story was not wrongful, his actions were not service discrediting. In essence, the appellant challenges the providency of his guilty plea because the military judge failed to evaluate the service discrediting element of the offense during the *Care* inquiry. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). We disagree.

During the guilty plea inquiry, the appellant acknowledged his understanding of all the elements of the offense, including the terminal element of Article 134, UCMJ, and he told the military judge that his conduct was prejudicial to good order and discipline. He then gave several reasons why his actions were service discrediting. Specifically, he stated that:

> [M]y actions were service discrediting because the main character of the story was an Air Force officer who had previously been stationed at

> McGuire. I posted the story under an old nickname that was an old nickname of mine that coworkers in the Air Force at Dyess Air Force Base had known me by in the past. Additionally, anybody reading this story would be shocked by the content if they knew that I, the author was an officer in the Air Force. This would not only cause them to think less of the Air Force officer corps but perhaps the Air Force in general.

Additionally, the Stipulation of Fact states: "The Accused's writing and publishing a story describing minors engaged in sexual acts was indecent and seriously detracted and compromised his standing as a commissioned officer, and is conduct morally unfitting and unworthy of a commissioned officer in the United States Air Force."

The crux of the appellant's argument is that, because his motivation for writing and publishing the story was to help children by identifying those who prey on them, his actions were not wrongful and therefore not service discrediting. Based upon his assertion at trial that his motives were pure, he now avers that his actions did not constitute a crime. In short, he argues that his motive negates the terminal element of an Article 134, UCMJ, offense. He asks this Court to view his actions in their complete context and set aside the finding of guilty to Specification 2 of the Charge.

After so viewing the appellant's actions in their complete context, we find that the military judge did not abuse his discretion by accepting the appellant's plea. The military judge was well aware of the appellant's stated motive and purpose for writing and publishing the story. In fact, the appellant told the military judge more than once why he wrote and published the story.

> MJ: And again, you have indicated that one of the reasons that you wrote this story was to kind of have inroads with these individuals, gain some credibility with them as you can try to find out where the child pornography sites and individuals who were abusing their kids?
>
> ACC: Yes, sir.
>
> MJ: But again, in discussing this with your defense counsel in that despite what your motive might have been, given the obscene nature of it, where you put it, making it available to the public and specifically to a group that seeks out this type of stuff based upon all of that, have you discussed with your defense counsel whether you have a legal defense to this offense in question?
>
> ACC: Yes, sir and I understand that there is no legal defense.
>
> MJ: So, even though your motive - - you may have had a motive to catch individuals do you understand or do you agree that what you did was

wrongful given the overall nature of the story and where you published it and its obscene nature?

ACC: Yes, sir I do.

MJ: So, you agree that you have no legal defense?

ACC: Yes, sir.

In further discussions of this specification, the appellant said his actions were to the prejudice of good order and discipline and explained why they were service discrediting. After considering the military judge' questions and the appellant's responses during the providence inquiry, we find that his claim that the military judge "failed to evaluate the complete context of the conduct at issue" is without merit and the military judge did not abuse his discretion in accepting the appellant's plea of guilty.

Ineffective Assistance of Counsel

In his second issue, the appellant asserts that his trial defense counsel[1] were ineffective for a litany of reasons, chief among them their failure to inform him that motive was an available defense to the Article 134, UCMJ, offenses. He asks this Court to set aside Specification 1 of the Charge and the Specification of the Additional Charge and remand the case for trial on the merits.

1. LAW

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We review de novo claims of ineffective assistance of counsel, *United States v Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997), using the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also* 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 12.09 (2d ed. 1992). To prevail on claims of ineffective assistance of counsel, the appellant must show: 1) his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment[2]; and 2) his counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. We start with the proposition that defense counsel are presumed to be competent. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). The appellant bears the heavy burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). Our superior court has established a three-part test to determine whether the presumption of competence has been overcome:

[1] The appellant was represented by a senior defense counsel (SDC) and an area defense counsel (ADC).
[2] U.S. CONST. amend. VI.

1. Are the appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

2. If the allegations are true, did defense counsel's level of advocacy "fall [ ] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

2. DISCUSSION

The appellant contends his attorneys, both senior defense counsel (SDC) and area defense counsel (ADC), misadvised him on whether he possessed a defense to the charges and specifications. The appellant prepared three separate written declarations to explain the rationale for this contention. In his first declaration, the appellant claims he told his counsel that his motivation for collecting the child pornography was to identify and report child pornography websites and individuals involved in child pornography and he was told that this was not a defense. He claims that if he knew he had defenses, he would have pled not guilty. He also believed that he unwittingly waived the right to expert assistance in exchange for the PTA without being advised that having experts would have been helpful in findings and sentencing. In his second declaration, the appellant claims that, prior to his withdrawal due to illness, SDC told him that whether he had to register as a sex offender depended upon state law. Later ADC told him that he would not have to register as a sex offender because he was charged with a military-specific offense. He pled guilty on the reliance of his counsel's advice that because it depended upon state law, he could relocate to a state where he would not have to register. He also claims that he would have contested the charges if he knew that he would remain exposed to sex offender registration by pleading guilty. In his third declaration, the appellant claims that he received between 6-12 assurances from SDC and ADC that with a 30-month PTA, there was a "very good chance" that he would receive parole after 10 months of confinement. The appellant states he was advised by his case worker that he was denied parole because he did not admit that he possessed the child pornography to satisfy his sexual desires, and that parole was typically granted to inmates who admit pedophilic desires and seek treatment. If he had known that he had to admit pedophilic desires to obtain parole, he would not have pled guilty or agreed to the PTA.

All three of the appellant's declarations highlight the key significant factor in his decision to plead guilty. Simply put, the appellant wanted to limit his exposure to confinement. Given the fact that the Government was contemplating a second Article 32,

UCMJ, 10 U.S.C. § 832, investigation after discovering new chat logs involving the appellant, time was of the essence. Accordingly, the appellant and his counsel discussed and planned a strategy designed to secure the protection of a pretrial agreement. Rather than risk a dismissal and 35 years of confinement by litigating the charges and specifications, they pursued a strategy that limited his potential confinement to 30 months.

According to the trial defense counsels' post-trial affidavits, the decision as to whether the appellant should plead guilty was the appellant's alone to make. Consistent with the appellant's affidavit, they both state that the appellant told them that his motivation for writing the story and possessing and distributing child pornography was to protect children. In fact, ADC made multiple requests to the FBI in an effort to corroborate the appellant's stated motive. However, both of his counsel deny misadvising the appellant and give different, but consistent, versions of the events giving rise to the appellant's claim that they provided him with ineffective assistance.

We considered the conflicting affidavits from the appellant and his trial defense counsel as we tested for prejudice. When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone; rather, we must resort to a post-trial fact-finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the alleged errors would not warrant relief even if the factual dispute were resolved in the appellant's favor. *Id.* at 248. Such is the case at hand. The appellant's assertions are without merit.

For purposes of our analysis, we will focus primarily on the comparison of the declarations of ADC and the appellant. SDC, the appellant's original defense counsel withdrew from the case due to a serious illness that ultimately resulted in his untimely death. After SDC's withdrawal, the appellant agreed to be represented by ADC alone. Even assuming that SDC told the appellant that the charges against him were "strict liability," that he had a good chance for parole, or that he would help the appellant to relocate to a state where he would not have to register as a sex offender, the appellant made the decision to plead guilty over a month after SDC had withdrawn from the case. As a result, we find the appellant's assertion that he pled guilty based upon the advice he received from SDC is not credible.

As previously noted, the appellant claims that he would not have pled guilty if he had received the proper advice from his defense counsel: that he had an available defense against the charges and specifications, that he would have to register as a sex offender, or that he would not be granted parole after 10 months. ADC denies telling the appellant that he had no defense, that he would not have to register as a sex offender, or that parole was guaranteed. Affirmative misrepresentations or false assurances by counsel about significant collateral consequences of a conviction may constitute

ineffective assistance of counsel. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484-85 (2010); *United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006). For prejudice to result from faulty advice regarding a collateral consequence of a guilty plea, the law requires that the issue be "a significant factor in deciding how to plead." *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009).

Here, the record as a whole compellingly demonstrates the improbability of the facts being asserted by the appellant. In her affidavit, ADC stated that she discussed the "pros and cons of waiving the impending second Article 32 investigation" with the appellant. Implicit in doing so, she had to face the real possibility that, without any additional exculpatory evidence, a fact finder would not believe the appellant's stated motive for his possession and distribution of child pornography or writing the story. Given the fact that the appellant had possessed child pornography over a five-year period without any legal authorization or proof that he provided tips to any law enforcement agency before Yahoo! deactivated his account, the appellant had no affirmative defenses. Any other possible defenses were limited at best. After consulting with ADC, he decided that his best course of action was to plead guilty. After the military judge reemphasized the facts and circumstances of this case, including the appellant's motive, the overall and obscene nature of the story and where he published it, the appellant stated that he had no legal defense. Near the conclusion of the *Care* inquiry, the appellant said he was satisfied with ADC and that her advice was in his best interest. Therefore, we are not convinced that the appellant's defense counsel misadvised him, as alleged.

Sexual Offender Registration

In his third assignment of error the appellant claims that his defense counsel misadvised him concerning whether he would have to register as a sex offender. We disagree. Despite his sworn affidavit stating that ADC told him that he would not have to register as a sex offender because he was charged with a "military-specific offense," the record indicates otherwise. Prior to his acceptance of the guilty plea, the military judge asked ADC whether she had advised the appellant that Specification 1 of the Charge and the Specification of the Additional Charge were specifically listed in Department of Defense Instruction (DODI) 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (17 Jul 2001). He also asked her whether she had advised the appellant about the possibility that Specification 2 of the Charge may also have reporting and registration requirements. She answered both questions in the affirmative. Next, he asked the appellant whether his counsel explained to him the reporting and registration requirements. The appellant answered the question in the affirmative. The military judge then discussed a document entitled *Notification of Sex Offender Registration Requirement*, which was signed by the appellant and entered as an appellate exhibit. It reads, in pertinent part:

> I have read and understand my rights and obligations, as stated above. I have read DoDI 1325.7 Enclosure 27: Listing of Offenses Requiring Sex Offender Processing. Additionally, I have been informed orally and in writing that I may be required to register as a sex offender in my state of residence if I am found guilty of any offense listed in DoDI 1325.7 Enclosure 27. I fully understand that if I plead guilty to, or am found guilty of, any offense listed in that Instruction, the Department of Defense officials will notify my ultimate state of residence and local authorities of my conviction and I may be required to register as a sex offender in my state. I fully understand that if I am required to register as a sex offender in my state of residence, I must comply with all sex offender registration laws and I may be subject to criminal prosecution if I fail to comply with said laws.

The appellant's statements under oath at trial are sufficient to convince us that his trial defense counsel properly advised him of the requirement to register as a sex offender despite his subsequent statements to the contrary.

Parole

In his fourth assignment of error, the appellant claims that his counsel misadvised him about parole. He states that they led him to believe that he would almost certainly obtain parole. In her affidavit, ADC acknowledged that she had spoken with the appellant about the possibility of parole. She told him when he would be eligible for parole and encouraged him to take part in self-improvement activities while confined to show that he had changed. His own statement adds credence to ADC's assertion that she did not tell the appellant that he would definitely receive parole at the earliest opportunity. By his own admission, the appellant was eligible for parole when ADC said that he would be, but his refusal to admit that his actions were motivated by sexual desire was the primary reason the board denied his parole. Even if we assume arguendo that the appellant's counsel misled him, we find no prejudice. The appellant knew that parole was not guaranteed at his earliest opportunity, and he still pled guilty. Given the appellant's expressed desire to receive the protection of the pretrial agreement, we are not convinced that his early opportunity for parole was a significant factor in his decision to plead guilty. *Denedo*, 66 MJ. at 129.

Expert Assistance

In his final assignment of error, the appellant claims his defense counsel provided ineffective assistance when they failed to procure the services of expert consultants in the fields of forensic computer analysis and psychology. We disagree. His counsel made a tactical decision to forego Government funded expert assistance to receive the benefit of a pretrial agreement.

Appellate courts give great deference to trial defense counsel's judgments, and "[a]s a general matter, [the courts] will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *Anderson*, 55 M.J. at 202). *See also United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. "In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (alteration in original) (quoting *Strickland*, 466 U.S. at 690). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). We find trial defense counsels' decision not to request expert assistance before the trial was made after careful determination that such a course of action was in the best interest of the appellant. Counsel had a reasonable basis to be concerned that given the proposed sentence limitation, requesting expert assistance would delay the trial and increase his exposure to long-term confinement. By securing an agreement from the Government, counsel effectively eliminated this danger to the defense case.

After the convening authority took action on the case, the appellant procured the services of Mr. WM, a forensic computer analyst. After reviewing the case files, Mr. WM expressed an opinion that he could have provided assistance in corroborating the appellant's claims that he provided tips to law enforcement authorities on a regular basis prior to 2007. Because he has not examined the appellant's computer, he could not verify whether the appellant actually sent more than the three tips found by the FBI. At this point, any prejudice to the appellant is speculative.

On 20 June 2009, the appellant was evaluated by Dr. TP, a forensic psychologist. Dr. TP concluded that the appellant's "current risk for future sexual acting out is considered to be low." Because Dr. TP conducted his evaluation over six months after the trial, this Court can only speculate as what his assessment would have been during his trial. We decline to do so. Simply put, we don't know what impact Dr. TP or Mr. WM's testimony or assistance would have had on the appellant's adjudged or approved sentence. What we know for certain is that the pretrial agreement resulted in a six month reduction to the period of adjudged confinement. Even if we assume prejudice because the appellant's counsel chose not to request Government-funded expert assistance, the appellant is not entitled to any relief.

The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time decisions are made, not on how they now appear in hindsight. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S.

at 689). The ADC made the decision to forego a request for an expert at Government expense in order to limit the appellant's exposure to confinement. The ADC's decision was justified by the facts of the case and the concern that the convening authority's willingness to offer a pretrial agreement was predicated upon a speedy resolution of the case. Determining whether to make such a tradeoff is just one of the many tactical decisions that defense counsel must make while formulating a trial strategy, and it is precisely the reason appellate courts are proscribed from second-guessing counsel. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (citing *Morgan*, 37 M.J. at 410). We find the defense decision to forego requesting Government-funded experts in exchange for limiting exposure to confinement was within the bounds of reasonable performance expected from competent counsel.

Appellate Delay

The overall delay of more than 540 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 MJ. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.[3]

Conclusion

The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ,

[3] We note this Court approved 12 requests from the appellant for an enlargement of time in this case. Additionally, we approved the appellant's request for oral argument.

10 U.S.C. § 866(c); *United States* v. *Reed*, 54 MJ. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court