UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NATHAN W. ROBERTS II
United States Air Force

ACM 37000

04 March 2009

Sentence adjudged 19 August 2005 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 36 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Tiaundra Sorrell, and Mary T. Hall, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, and Major Brendon K. Tukey.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was arraigned on a total of five charges and six specifications. Consistent with his pleas, he was found guilty of dereliction of duty on divers occasions, for transporting and leaving unattended, on base, a rifle and a shotgun in his vehicle, and for unlawfully carrying a concealed weapon on divers occasions, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The appellant was also charged with

unpremeditated murder. After pleading to the lesser included offense of unlawfully killing someone by engaging in inherently dangerous actions, in violation of Article 118(3), UCMJ, 10 U.S.C. § 918(3), a military judge, sitting alone, found the appellant guilty of the greater charged offense of unpremeditated murder, in violation of Article 118(2), UCMJ, 10 U.S.C. § 918(2).[1] The military judge sentenced the appellant to a dishonorable discharge, reduction to E-1, and 37 years of confinement. The convening authority approved the sentence as adjudged, except he reduced the confinement to 36 years for reasons set out below.

Background

The appellant was a nuclear weapons munitions maintenance team member, serving at Kirtland Air Force Base in Albuquerque, New Mexico. Prior to these offenses, he had no disciplinary record and had performed satisfactorily during his four-plus years of service.

In the weeks and months prior to the night in which the appellant killed a fellow airman, he had developed an interest in guns and had begun a small collection. Included in these weapons were a rifle, a shotgun, and a .40 caliber handgun. His propensity to keep the weapons in his vehicle or on his person, in the case of the handgun, ultimately is the genesis of all charges.

As for the murder charge, the essential facts are not in dispute. The appellant attended a birthday party at the home of an acquaintance. The party, attended by 35-40 people, included both military members and civilians. Around midnight, after having had a few drinks, the appellant planned to leave the party. Just prior to his planned departure, he came across the murder victim and the victim's girlfriend. Since the appellant and the victim were co-workers from the same squadron, he stopped and talked briefly. During the course of this short talk, the victim unexpectedly struck the appellant on his right side. After leaving the victim for a few minutes, the appellant returned and unexpectedly struck the victim in his stomach while he was drinking. As a result of these incidents, the victim and the appellant exchanged some heated words, but the situation was quickly diffused by a bystander, and the matter seemed resolved. A short time later, the appellant proceeded to his vehicle, expressing a plan to leave the party, while at the same time assuring a companion he was fine to drive.

Within two minutes of his departure, the appellant returned to the front porch of the house, where the victim remained. At this time the appellant was in possession of his handgun. Once there, the appellant apologized to the victim for striking him and then asked the victim to apologize. The victim, unaware the appellant had a weapon, declined

[1] As for the remaining two charges, one was dismissed prior to pleas and the other was dismissed after the judge had accepted the appellant's pleas.

to apologize. After the victim said no, the appellant raised the handgun, pointed it at the victim, and pulled the trigger. The victim, less than 30 inches away, was struck in the face by a bullet and died within a few hours of the wounds.

On appeal, the appellant asserts a total of 10 errors.[2] We have reviewed the briefs from both parties and the post-trial declarations admitted before this Court. We have carefully reviewed each assignment of error and address, in detail, the most significant ones below.

Factual and Legal Sufficiency

The appellant claims that the evidence is legally and factually insufficient to support his conviction for unpremeditated murder, in violation of Article 118(2), UCMJ.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325. In addition, when considering a conviction of a greater offense after a plea to a lesser included offense, we may not consider admissions made during the plea inquiry to establish the disputed element of the greater offense. *See United States v. Caszatt*, 29 C.M.R. 521, 523 (C.M.A. 1960) (guilty plea to one offense cannot be used to establish the elements of a separate, contested offense); *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001).

In pleading guilty to the lesser included offense, the appellant only disputes the issue of intent at the time he pulled the trigger. In an effort to prove he had the intent to "kill or inflict great bodily harm upon a person," the prosecution relied both upon inferences drawn from the stipulation of fact, and the testimony of four witnesses. These witnesses described the facts and circumstances surrounding the events leading up to and the actual shooting of the victim. From the testimony alone, we know the appellant argued with the victim in the minutes prior to the shooting. The appellant then went to his car to leave, but returned shortly thereafter to the victim's location and asked the victim to apologize. After the victim refused to apologize, the appellant drew a loaded weapon, aimed it at the victim, and immediately shot the victim from approximately two feet away.

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[2] Of the ten errors, five of them are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

In support of his argument that the evidence does not establish his intent to kill or inflict great bodily harm, the appellant first points to inconsistencies in the testimony of the witnesses present when he shot the victim. While we acknowledge there are inconsistencies, we find none of them undermine the overwhelming circumstantial evidence that the appellant intended to at least inflict great bodily harm on the victim when he intentionally drew his weapon and fired at point blank range. Despite the minor inconsistencies, all witnesses testified consistently on these critical facts.

In addition, the appellant argued at trial that his intent was simply to pull the trigger to the "second position," not to shoot the weapon. We do not find this explanation to be reasonable in view of all of the other facts and circumstances surrounding the shooting. The appellant and the victim had a heated exchange. The appellant went out of his way to return to the victim's location in an effort to obtain an apology. When that apology was not forthcoming, the appellant drew his weapon, aimed it at the victim, and shot him in the face. The only reasonable intent to draw from these actions is the intent to kill or inflict great bodily harm. Therefore, we reject his claim of both legal and factual insufficiency.

Stipulation of Fact

As a result of the appellant's decision to seek a pretrial agreement (PTA), the appellant agreed to and did in fact enter into a "reasonable stipulation of fact." Included in the stipulation was the additional provision that the facts contained in the stipulation could be used "for all purposes in this court-martial including the findings and the sentence."

The appellant now makes two primary assertions of error related to the stipulation of fact. In the first, the appellant contends he did not knowingly consent to the use of the stipulation of fact as a basis for proving the contested element of intent. Second he claims that his defense counsel was ineffective because they failed to explain to him the "terms and consequences" of his decision to enter into the stipulation of fact. The appellant makes both assertions in his post-trial affidavit dated 30 May 2008.

In responding to the appellant's claims, we need look no further than the record itself to resolve both issues. When the stipulation of fact was offered, the prosecution expressly advised the military judge that the prosecution would rely upon inferences from the stipulation in their efforts to prove the greater offense. The defense counsel agreed with this assertion at trial. Based upon these representations, the military judge conducted a complete inquiry with the appellant regarding the stipulation and the uses of the stipulation. During this inquiry, the appellant acknowledged that he understood the prosecution could rely upon "permissible inferences drawn from the stipulation that could be used by the government in trying to prove the greater offense," that he had discussed

this with his counsel, and that he understood the possible uses of the stipulation.[3] Considering this exchange, we are satisfied the stipulation was properly entered consistent with Rule for Courts-Martial (R.C.M.) 811(a). *United States v. Glazier*, 26 M.J. 268, 270 (C.M.A. 1988). We are also satisfied that it did not constitute a confessional stipulation because a dispute over the appellant's intent remained. *See* R.C.M. 811(c); *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) (confessional stipulation inadmissible without express consent of accused); *United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008) (not ineffective assistance of counsel to admit to certain offenses if ability to litigate remaining greater offenses is preserved).

Applying the law related to ineffective assistance of counsel and the principals set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude that the claim of ineffective assistance is without merit based upon the fifth principle outlined in *Ginn*. It provided that

> when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Id. The appellant has provided no rational basis for why we should not consider his trial assertions. Therefore, we reject the appellant's claims regarding the stipulation of fact.

Finally, we note that even if we were to disregard the stipulation, we are satisfied that the testimony of the four prosecution findings witnesses, alone, establish beyond a reasonable doubt the appellant had the intent to kill or inflict great bodily harm upon the victim at the time he shot the victim. Therefore, even if we were to find error regarding the use of the stipulation, we are satisfied that any error was harmless beyond a reasonable doubt. *Grijalva*, 55 M.J. at 228.

Speedy Trial[4]

The appellant alleges, as he did at trial, that he was denied the right to a speedy trial, in violation of Article 10, UCMJ, 10 U.S.C. § 810. Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" to either "try him or to dismiss the charges and release him." In the appellant's case, it took the prosecution a

[3] We are also satisfied, based on this exchange coupled with a latter exchange with the judge, that the appellant was also aware that all the prosecution exhibits would be considered on the issue of intent.
[4] This issue was raised pursuant to *Grostefon*.

total of 270 days from the date he was placed in military-controlled pretrial confinement to bring him to trial.[5]

We review speedy trial issues de novo. *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Proctor*, 58 M.J. 792, 794 (A.F. Ct. Crim. App. 2003). While doing so, we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Proctor*, 58 M.J. at 795.

"The test for compliance with the requirements of Article 10[, UCMJ,] is whether the government has acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (quoting *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999) (quoting *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993))). Our superior court has often said it does "not demand constant motion [from the government], but reasonable diligence in bringing the charges to trial." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F 2007) (quotations omitted). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment,[6] the four-part test set out in *Barker v. Wingo,* 407 U.S. 514 (1972), is a proper analytical tool for deciding Article 10, UCMJ, issues. *Cossio*, 64 M.J. at 256; *Mizgala*, 61 M.J. at 129; *Birge*, 52 M.J. at 212.

The Supreme Court established the test for Sixth Amendment speedy trial violations in *Barker*. In applying this four-part test, we look at the length of the delay in bringing the appellant to trial, the reasons for the delay, whether the appellant asserted his right to a speedy trial prior to trial, and the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530; *United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F. 2000); *Cossio*, 64 M.J. at 256.

Reviewing the record, the briefs, the trial judge's findings and conclusions, and the applicable law, we find the appellant was not denied a speedy trial under Article 10, UCMJ, or the Sixth Amendment. The military judge's findings and conclusions are fully supported by the record and we adopt them as our own. *See* Article 66(c), UCMJ. Based upon these findings and conclusions, it is clear the government took immediate steps to inform the appellant of the charges against him, and thereafter exercised reasonable diligence in accomplishing those tasks necessary to try him.

Ineffective Assistance of Counsel[7]

In his brief and his affidavit, the appellant raises other claims of ineffective assistance of counsel, in addition to the one discussed above related to the stipulation of

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[5] The appellant was briefly held in civilian custody.
[6] U.S. CONST. amend VI.
[7] This issue was raised pursuant to *Grostefon*.

fact.[8] In particular, he claims his new lead counsel did not seem to have much confidence, seemed only interested in a plea, failed to call two local police officers to testify regarding his demeanor at the crime scene, and failed to call someone named Oliver who could have testified as to the victim's bad temper when he was drunk.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). 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). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id.* Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Finally, because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *Ginn*.

Addressing first the general attack against his new lead defense counsel, we are able to resolve these allegations by relying upon the second principal in *Ginn*. It provides that "if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Ginn*, 47 M.J. at 248. The appellant's claims of a lack of confidence and a singular interest in a plea are mere conclusory observations. While we acknowledge that his prior lead counsel had spent numerous days of court time litigating 10 motions, we believe it was this effort that laid the ground work for the PTA. This PTA, negotiated by his new lead counsel, required the government to forgo prosecution of two previously charged specifications of provoking speech, required the government to withdraw a charge of obstructing justice, and, most significantly, obligated the prosecution to not proceed on the original charge of premeditated murder. Considering the undisputed facts surrounding the shooting of the victim, the appellant faced a real possibility of being convicted of premeditated murder, but for the PTA. A conviction for premeditated murder would have resulted in a mandatory sentence of life imprisonment. The success in negotiating a PTA in many respects is a remarkable accomplishment considering the facts surrounding the killing.

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[8] All of the appellant's ineffective assistance of counsel claims are directed at his defense team during the final phase of trial. Prior to pleas the appellant had a different lead counsel who was forced to withdraw from the case after ten days of motions because of a potential conflict, regarding an allegation against her. After accepting lead counsel's request to withdraw from the case, the appellant was given an almost-three-month delay for his new counsel to prepare. In making his claims of ineffective assistance of counsel, he does not contest the removal of his first lead counsel.

Addressing the claim of ineffective assistance for failing to call the police officers and Oliver, we are able to rely upon the first principal of *Ginn* in resolving these assertions. It provides that "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in [the] appellant's favor, the claim may be rejected on that basis." *Id.*

In his affidavit, the appellant alleges that the police officers would have testified that the appellant was remorseful at the scene and in a state of shock. We are satisfied that essentially this same information was already included in the stipulation of fact. It established as fact that the appellant repeatedly said he was sorry and it was an accident. Further, it established as fact that immediately upon shooting the victim the appellant "dropped the gun and said 'Oh Shit,' after which he walked in a circle appearing confused and saying, 'I am going to jail.'"

Looking at the claim that Oliver would have testified that the victim had a bad temper when he was drunk, we are satisfied that such additional testimony, even if true, would have had no impact on the outcome of the case. While arguably the defense could have presented evidence that the victim had a bad disposition when he was drunk under Mil. R. Evid. 404(a)(2), the appellant does not contend, nor does the testimony he references in his brief suggest, that the appellant was aware of this propensity at the time of the shooting. But even if we assume he was aware of such a propensity, this information would have added little to the testimony already offered at trial. Prosecution witnesses testified at trial regarding the victim's willingness to fight the appellant over the exchange of blows. Therefore, additional testimony from Oliver would have added little more.

When we consider the "missing testimony" in conjunction with the information already before the Court, we are satisfied that the appellant has failed to establish either defective performance on the part of his defense counsel or evidence of prejudice. We reject any claim of ineffective assistance of counsel based upon both of these sets of allegations. The facts alleged in the appellant's affidavit allege an error that would not result in relief even if any factual dispute were resolved in his favor.

Post-trial Delay

The appellant's next claim is that he was denied his due process rights in the post-trial processing of his case. His claim focuses on the time required to complete the record, have the convening authority take action, and docket the case with this Court.[9]

[9] The appellant does not claim a due process violation for the time required for this case to be reviewed by this Court. Having considered *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), we are satisfied that no prejudice has occurred.

Our superior court has provided a clear framework for analyzing post-trial delay, utilizing the four factors established by the Supreme Court in *Barker*: (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005). If the length of the delay is "facially unreasonable," we must balance the length of the delay against the other three factors. *Jones,* 61 M.J. at 83.

Because the appellant's case was tried prior to *Moreno*, the presumptions of unreasonable delay that apply to post-trial processing by this Court do not apply to the processing delays occurring before docketing with this Court. Nevertheless, we find the pre-docketing delays in this case are facially unreasonable, triggering a due process review. *United States v. Young*, 64 M.J. 404, 409 (C.A.A.F. 2007).

Regarding the first *Barker* factor, 635 days elapsed from the date of trial until the appellant's record of trial was docketed with this Court. Of that time, 371 days elapsed between the date of trial and authentication of the record of trial, 180 additional days elapsed between authentication and the convening authority's action,[10] and 85 days elapsed between the convening authority's action and docketing with this Court. This factor weighs heavily in favor of the appellant.

In addressing the second factor,

> we look at the [g]overnment's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In assessing the reasons for any particular delay, we examine each stage of the post-trial period because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment."

Moreno, 63 M.J. at 136.

The government contends that the 371-day delay between trial and authentication of the record is due to the complexity of the case and length of the record of trial (21 volumes). In addition, they cite office turmoil and a heavy case load as justification of more than a year to complete the record of trial. Regarding the 180-day delay between authentication of the record and the convening authority's action, we note that at most the defense is responsible for 30 days of this time, and the government offers no explanation for the excessive delays in completing addenda to the original staff judge advocate's recommendation in response to defense submissions. Finally, the government does not offer any explanation for the 85-day delay between the convening authority's action and

[10] The briefs and the court-martial order all indicate the convening authority took action on 12 March 2007. The actual date of action was 20 February 2007, and the court-martial order is incorrectly dated 12 March 2007.

the docketing of this case before this Court. Our superior court has held that delay in forwarding a case to the appellate court following the convening authority's action is "the least defensible of all" post-trial delays. *Id.* at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). We conclude that these periods of delay weigh heavily in favor of the appellant.

Considering the third factor, we note that the appellant first raised concerns about the post-trial processing delays in his clemency submission. Despite raising these concerns, it still took an additional 110 days before action was taken in the case. As such, we find this factor weighs in the appellant's favor as well.

Finally, we note that the appellant does not allege to this Court actual prejudice for the delays in his post-trial processing.[11] In the absence of any actual prejudice, we will find a due process violation only if, in balancing the other three factors, the delay is "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). If this analysis leads to the conclusion that an appellant has been denied the due process right to speedy post-trial review and appeal, "we grant relief unless this [C]ourt is convinced beyond a reasonable doubt that the constitutional error is harmless." *Id.* at 363. Issues of due process and whether constitutional error is harmless beyond a reasonable doubt are reviewed de novo. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

The post-trial processing delay in bringing this case to the convening authority for action was clearly egregious, illustrates an unacceptable disregard for the constitutional protections afforded to an accused during the post-trial process, and amounts to a due process violation. The staff judge advocate recognized the gravity of the issue when he recommended that the convening authority reduce the sentence by one year. While we commend the staff judge advocate for seeking to provide meaningful relief at his level, we have two concerns with his advice that raise questions as to the adequacy of the relief granted. First, he suggests to the convening authority that the relief should be granted as a matter of clemency vice relief for a due process violation, and second, he misstates the standard prescribed by *Moreno*. The 120-day standard is from sentence to action, not sentence to authenticated record. This misunderstanding leads to an error in his calculation and recommendation for an appropriate remedy.

Relief for Due Process Violation

The due process violation resulting from the post-trial delay in this case warrants meaningful relief as long as relief is available that is not also disproportionate to the harm

[11] We do acknowledge that in his clemency submission, the appellant did allege he was prejudiced by the post-trial processing delays. He has not renewed this claim in his appellate brief before this Court.

caused. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). The appellant's case was not docketed with this Court until 636 days after the sentence was announced. Under the standards prescribed by *Moreno*, this was 486 days longer than our superior court now considers reasonable. While we recognize that the standards in *Moreno* do not apply to this case, we still consider these standards a valuable measurement of reasonable processing times. In addition, we find it troubling that this is the third case arising from the same installation, during the same period of time, in which gross delays occurred in the processing of a court-martial matter. *See United States v. Preciado*, 67 M.J. 559 (A.F. Ct. Crim. App. 2008); *United States v. Myers*, ACM 35781 (f. rev.) (A.F. Ct. Crim. App. 12 Dec 2008) (unpub. op.). Finally, we are particularly troubled by the fact that even after the appellant expressed his concern over the time it was taking to process his case, the legal office took an additional 175 days to complete the record for docketing with this Court. Based upon all of these factors, which are unique to this case, we believe the appellant is entitled to additional relief of an additional reduction of one year from his sentence for the lengthy post-trial, pre-docketing delays of this case.

Sentence Appropriateness

The appellant contends that his sentence is inappropriately severe. He argues the sentence fails to reflect his clean record and his actions immediately after the shooting, in which he rendered aid and did not leave the scene.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd* 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Airman First Class William B. Wilson IV is dead. He was 19 years old and by all accounts had a full, rewarding, and productive life ahead of him. He had the love and respect of family and friends to guide and support him through life. His death is a tragedy beyond comprehension when one considers the trivial matter over which the appellant chose to kill him. After considering the appellant's conduct, his clean record, his response to his killing, and the ramifications of his conduct, we are satisfied that his sentence is appropriate.

Final Matters

We have also considered the appellant's remaining assertions of error. Having considered each of them, we find them to be without merit and not requiring further discussion. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Court-Martial Order

The Court-Martial Order in this case is wrong. It does not reflect all of the charges and specifications for which the appellant was arraigned during the first day of trial, on 4 May 2005. We also note that the order itself is dated 12 March 2007, despite the fact the action was taken on 20 February 2007. Therefore, we order the promulgation of a corrected Court-Martial Order, consistent with this guidance.

Conclusion

Having found a due process violation in the post-trial processing of this case, we approve only so much of the sentence as provides for a dishonorable discharge, reduction to E-1, total forfeiture of all pay and allowances, and 35 years of confinement. The approved findings and the sentence, as modified, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly the approved findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court