

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

BEFORE

J.W. ROLPH

J.D. HARTY

R.D.KELLY

UNITED STATES

v.

**Brendan C. FORNEY
Lieutenant Junior Grade (O-2), U.S. Navy**

NMCCA 200200462

Decided 30 August 2007

Sentence adjudged 02 March 2001. Military Judge: D.M. White. Staff Judge Advocate's Recommendation: LCDR C.J. Spain, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

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MATTHEW S. FREEDUS, Civilian Appellate Defense Counsel
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LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A general court-martial composed of members convicted the appellant, contrary to his pleas, of conduct unbecoming an officer and a gentleman and two specifications of wrongfully possessing child pornography, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933, and 934, and 18 U.S.C. § 2252(A). The appellant was sentenced to 12 months confinement and a dismissal from the United States Navy. The convening authority (CA) approved the sentence as adjudged.

This case is before us for the second time. In *United States v. Forney*, No. 200200462, 2005 CCA LEXIS 235, unpublished op. (N.M.Ct.Crim.App. 19 Jul 2005), this court addressed seven assigned errors including post-trial processing delay and the

constitutionality of the appellant's convictions¹ based on possession of child pornography, as defined by 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D), under the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A(a)(5)(B), charged under the third clause of Article 134, UCMJ. We held that there was no due process violation as a result of the post-trial delay in this case. *Forney*, 2005 CCA LEXIS 235, at 20-23. Concerning the appellant's conviction for possession of child pornography, charged under the third clause of Article, 134, UCMJ, (Additional Charge, Specification 2), we set aside and dismissed the findings of guilty because the conviction was premised, in part, upon the CPPA definitions of child pornography subsequently determined to be unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *Id.* at 11 and 23. However, we affirmed the appellant's conviction of conduct unbecoming an officer based on his "attempted possession" of child pornography and his "possessing and receiving these images onboard a Navy warship." *Id.* at 13-15. We reassessed the appellant's sentence and affirmed the sentence as approved. *Id.* at 23.

On 24 April 2006, the Court of Appeals for the Armed Forces (CAAF) granted the appellant's petition for review,² and subsequently issued the following Remand Order:

On consideration of the granted issues, we conclude that further review under Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c) (2000), by the United States Navy-Marine Corps Court of Criminal Appeals is appropriate in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F. 2006). Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The

¹ The appellant was found guilty of possession of child pornography under Article 134, UCMJ, but also conduct unbecoming an officer based on possession of the same child pornography under Article 133, UCMJ.

² The petition was granted on the following two issues:

- I. WHETHER APPELLANT'S ARTICLE 133 CONVICTION CAN BE SUSTAINED EVEN THOUGH HE PLEADED NOT GUILTY AND THE SPECIFICATION ON WHICH HE WAS TRIED EXPRESSLY RESTED ON A STATUTE THAT THE SUPREME COURT HAS FOUND UNCONSTITUTIONAL.
- II. WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE OF UNJUSTIFIED POST-TRIAL DELAY.

The court requested briefs on Issue II only. See CAAF's Order Granting Review of 24 Apr 2006.

record is returned to the Judge Advocate General of the Navy for remand to that court.

CAAF's Remand Order of 11 Sep 2006. The scope of our review on remand will be confined to the terms of our superior court's remand order. See *United States v. Jordan*, 35 M.J. 856, 861 (N.M.C.M.R. 1992) ("The scope of review on remand will be interpreted closely . . . [and] is determined on the basis of the qualifying terms of the remand order.").

We have again carefully reviewed the record of trial, except for the images of child pornography admitted at trial and ordered sealed, and the pleadings of counsel. We have applied our superior court's guidance provided in *Cendejas* and *Moreno* in conducting our statutory review of the finding of guilty to conduct unbecoming an officer and to the issue of post-trial delay, respectively. For the reasons discussed below, we again affirm the appellant's conviction for conduct unbecoming an officer, however, we conclude that the post-trial delay in this case violated appellant's due process right to speedy post-trial review. We will grant relief for the due process violation as explained in further detail below.³

***Cendejas* and its Impact Upon the Appellant's Conduct Unbecoming an Officer Conviction**

On remand, the appellant argues that *Cendejas* requires that we set aside the finding of guilt as to the Article 133, UCMJ, charge because: (1) the appellant was not tried for a violation of clause one or two under Article 134, UCMJ, as in *Cendejas*; (2) the appellant was not tried for an attempt to possess and receive child pornography, he was tried for the consummated offense; (3) affirming the Article 133, UCMJ, conviction based on the underlying act of attempted possession of child pornography was improper; and, (4) the appellant was never given the opportunity to defend against attempted possession of child pornography. Appellant's Brief on Remand of 11 Oct 2006 at 6-8. The Government argues that *Cendejas* has "no applicability to Appellant's case." Government Answer on Remand of 9 Nov 2006 at 2. Our scope of review on remand is determined by the Remand Order itself rather than how the appellant frames the issue. We will, therefore, conduct an independent analysis of case law, including *Cendejas*, to determine what portion of the remaining findings are correct in law and fact. See Art. 66(c), UCMJ.

In *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), our superior court determined, in an officer guilty plea case, that the "receipt or possession of 'virtual' child pornography can,

³ The appellant, again, raises a constitutional challenge to the lack of fixed terms for judges of this court. We have previously considered this issue and declined to grant appellant relief. *Forney*, 2005 CCA LEXIS 235, at 22-23. We will not revisit this issue a second time. See *Jordan*, 35 M.J. at 861

like 'actual' child pornography, be service-discrediting or prejudicial to good order and discipline." *Id.* at 20. Proceeding on the assumption that the images of child pornography were "virtual," the court placed significant weight on the fact that Mason was a commissioned officer engaged in receiving and viewing the images on a government computer in his workplace. Under those circumstances, the court determined that the "distinction between 'actual' child pornography and 'virtual' child pornography does not alter the character of Mason's conduct as service-discrediting or prejudicial to good order and discipline." *Id.* This conclusion was based, in part, on the Supreme Court's recognition that:

While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 20 (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)). Accordingly, our superior court concluded "Mason's conduct in receiving those images on his government computer can constitutionally be subjected to criminal sanction under the *uniquely military offenses* embodied in clauses 1 and 2 of Article 134." *Id.* (emphasis added). See *United States v. Roderick*, 62 M.J. 425, 428 (C.A.A.F. 2006) (holding receipt or possession of "virtual" child pornography can be service-discrediting or prejudicial to good order and discipline) (quoting *Mason*, 60 M.J. at 20). We will assume, without deciding, that the images possessed by the appellant were "virtual" child pornography and therefore protected under the First Amendment, and decide, in light of *Free Speech Coalition* and *Mason*, whether the appellant's conduct was unbecoming an officer and a gentleman, even if such conduct would be protected in a civilian context.

In *Cendejas*, 62 M.J. 334, decided after *Mason* but before *Roderick*, our superior court addressed the same issue in the context of a not guilty plea to an Article 134, UCMJ, offense. There, *Cendejas* was convicted of possessing child pornography in violation of the CPPA, charged under the third clause of Article 134, UCMJ. *Id.* at 335. The military judge determined eight of the 20 images submitted by the Government met the definition of child pornography under 18 U.S.C. § 2256(8), but did not state on the record which definition under that statute was met. Because a review of the record did not reveal whether the military judge "relied only on those portions of the definition later found to be constitutional by the Supreme Court [in *Free Speech Coalition*]," our superior court determined that our sister court could not engage in factfinding to affirm the conviction, and concluded the lower court should have set the conviction aside.

Id. at 339. In addition, our superior court determined that the service court's use of its factfinding powers under Article 66(c), UCMJ, to determine the "actual" nature of the child pornography, denied the appellant his due process right "to confront the Government's evidence on the issue of whether the images were of 'actual' or 'virtual' children and to present evidence on his behalf that the images were 'virtual.'" *Id.* at 340. Although setting aside the conviction as a violation of clause three of Article 134, UCMJ, our superior court stated in dicta that:

Under the precedents of this court . . . a servicemember can be prosecuted under clauses 1 and 2 of Article 134 for offenses involving virtual child pornography even though such conduct is constitutionally protected in civilian society. Accordingly, in cases prosecuted under clauses 1 and 2, the Government bears no burden of demonstrating that the images depict actual children -- with or without expert testimony.

Id. at 338 n.5.

Following our superior court's precedent, we conclude that the possession of child pornography can be conduct unbecoming an officer and a gentleman, and therefore punishable under Article 133, UCMJ, regardless of whether the images are of actual or virtual children depicted as engaging in acts qualifying as child pornography.⁴ Article 133, UCMJ, is a purely military offense that can be violated by acts which are not criminal by themselves or would not be criminal if committed by a civilian. *See United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994)(officer solicited the distribution of child pornography where the underlying statute was arguably unconstitutional); *see also United States v. Taylor*, 23 M.J. 314, 318 (C.M.A. 1987)(officer requested another person to commit an offense under circumstances when the requested act was not punishable under the UCMJ). We see no logical reason why the possession of virtual child pornography cannot be the basis for conduct unbecoming an officer and a gentleman for purposes of Article 133, UCMJ, when the same conduct qualifies as prejudicial to good order and discipline or as service discrediting behavior for purposes of Article 134, UCMJ.

In describing the scope of what conduct is unbecoming an officer and a gentleman under Article 133, UCMJ, the Manual for Courts-Martial states, in part, that:

Conduct violative of this article is action or behavior in an *official capacity* which, in dishonoring or

⁴ The elements of Article 133 are straightforward: (1) that the accused did or omitted to do certain acts; and, (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 59(b).

disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an *unofficial or private capacity* which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. . . . This article prohibits conduct by a commissioned officer . . . which, *taking all the circumstances into consideration*, is thus compromising.

MCM, Part IV, ¶ 59c(2)(emphasis added). Certainly, the appellant's possession of child pornography, actual or virtual, on a government computer on board a Navy warship, whether considered in his official, unofficial, or private capacity, dishonored and disgraced him as an officer and compromised his standing as an officer and as a gentleman.

The appellant's confessions, admitted at trial, show that the appellant downloaded, on board ship, 1,700 to 1,800 images of naked adolescent girls between the ages of 10 and 15 years of age, some engaged in displaying their genitalia, others engaged in oral sodomy, and others engaged in sexual intercourse. Prosecution Exhibits 13 and 19. Thirty-two pages of images recovered from media storage located in the appellant's stateroom and on the government computer he used in the engineering spaces, all on board ship, were admitted into evidence. PE 4 through 7, 9, 11, and 18. Based on the definitions of child pornography given by the military judge as part of the elements instruction on the Article 133, UCMJ, offense, Record at 793-94,⁵ including those definitions struck down in *Free Speech Coalition*, the members determined that the admitted images met one or more of those definitions. Appellate Exhibit XXXVIII.

The Government's evidence was both factually and legally sufficient to support the appellant's conviction of Article 133, UCMJ, based on the possession of images that met the definition provided by the military judge to the members. Because Article 133, UCMJ, would have been violated by images of virtual as well as actual children involved in sexually explicit conduct, it does not matter whether the members were provided with a definition of child pornography that contained, in part, a definition that would be unconstitutional if applied to civilians. Because the Government did not have an obligation to establish that any image was of an actual child, it is not of constitutional significance whether the appellant had the opportunity to challenge the nature of the images as virtual. *See Cendejas*, 62 M.J. at 338 n.5.

A different panel of this court concluded that "the appellant's underlying conduct of possessing and receiving these images on board a Navy warship 'independently satisfied the constitutionality of the [CPPA]." *Forney*, 2005 CCA LEXIS 235 at

⁵ The findings instructions are not contained in the record of trial as an Appellate Exhibit but are transcribed as given by the military judge.

13 (quoting *United States v. Sollmann*, 59 M.J. 831, 835 (A.F.Ct.Crim.App. 2004)).⁶ That panel affirmed the Article 133, UCMJ, conviction based on the appellant's "attempting to possess, child pornography on board USS DAVID R. RAY" *Id.* at 15. This court did not affirm a finding of guilt to the lesser included offense of attempted conduct unbecoming an officer, we affirmed the consummated offense of conduct unbecoming an officer and a gentleman based on the appellant's proven conduct which this court characterized as an attempt. We disagree, in part, with the prior panel's conclusion, and to the extent that the prior opinion characterizes the appellant's behavior as an "attempt" to possess child pornography, it is disapproved. Based on the above, we affirm the appellant's finding of guilty to the Charge and its sole specification alleging conduct unbecoming an officer and a gentleman based on the possession of images of children, actual or virtual, engaged in sexually explicit conduct.

Moreno and the Impact Upon Appellant's Post-Trial Delay

Under *Moreno*, when analyzing post-trial delay and whether it has violated appellant's due process rights, the first question to consider is whether the delay is "facially unreasonable." *Moreno*, 63 M.J. at 136. There may be a presumption of unreasonable delay under certain circumstances for those courts-martial completed *after* the date of the *Moreno* decision. *Id.* at 142. This presumption obviously does not apply in the appellant's case because his court-martial was completed prior to the *Moreno* decision. Nevertheless, we find the delay in this case (1,600 days from date of sentencing until this court's original decision) to be facially unreasonable, thus, triggering a further due process review. *United States v. Young*, 64 M.J. 404, 408 (C.A.A.F. 2007).

A due process review involves the consideration and balancing of 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 a timely appeal; and (4) the prejudice to the appellant. *Moreno*, 63 M.J. at 135. Each factor must be analyzed and balanced to determine if it favors the Government or the appellant. *Moreno*, 63 M.J. at 136. No single factor is necessarily dispositive. *Id.* If this analysis leads to the conclusion that the appellant's due process right to a speedy

⁶ Subsequent to the prior panel's resolution of the appellant's case, this court again addressed the possession of images of child pornography in violation of the CPPA charged as an Article 133, UCMJ, offense. See *United States v. Mazer*, 62 M.J. 571 (N.M.Ct.Crim.App. 2005). In *Mazer*, the appellant plead guilty to the Article 133, UCMJ, offense based in part on definitions later determined to be unconstitutional. We concluded "that the appellant's underlying conduct of possessing and receiving these images 'independently satisfied the requirements of Article 133, UCMJ, regardless of the constitutionality of the [CPPA].'" *Id.* at 575 (quoting *United States v. Sollmann*, 59 M.J. 831, 835 (A.F.Ct.Crim.App. 2004)).

post-trial review has been violated, "we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless." *Young*, 64 M.J. at 409 (quoting *United States v. Toohey*, 63 M.J. 353, 363 (C.A.A.F. 2006)).

1. Length of Delay

In *Moreno*, our superior court considered the first factor and determined that the length of delay in that case (1,688 days) between sentencing and the decision of this court was facially unreasonable. *Moreno*, 63 M.J. at 136. In this case, our length of delay is quite similar - 1,600 days. We also find this delay to be facially unreasonable for the first prong of our analysis. Thus, this factor weighs against the Government.

2. Reasons for the delay

Regarding the second factor, reasons for the delay, *Moreno* instructs us to examine each stage of the post-trial period to determine responsibility for the delay and whether any legitimate reasons exist that might explain the delay. *Moreno*, 63 M.J. at 136. We will consider the following three stages of delay in this case: (1) the 257 days between the end of trial and the convening authority's (CA) action; (2) the 127 days between the CA's action and docketing with this court; and (3) the 810 days between docketing and this court's final decision.

In analyzing the delay between the end of trial and the CA's action, we begin with two principles recognized in *Moreno*. First, that "[t]he processing in this segment is completely within the control of the Government" and, second, that there is a presumption of unreasonable delay when the CA fails to take action within 120 days of the trial. *Moreno*, 63 M.J. at 142. The 257 days it took for the CA to act in this case is well-over the prospective 120-day rule established in *Moreno*. Although we understand that the 120-day rule is not necessarily a fixed-certain period of time, the Government fails to demonstrate any exceptional circumstance(s) that may justify this extensive delay. Moreover, the Government admits that the appellant complained early and often regarding the delay in his case. This concession is supported by numerous letters in the record from the appellant's civilian defense counsel indicating, early on, his concern over the post-trial processing of this case. *See, e.g.*, Attorney Fidell ltr of 8 Oct 2001; Attorney Fidell ltr of 16 Oct 2001.

We are also cognizant of the fact that this was a contested members case with a fairly lengthy record of trial (910 pages) and multiple exhibits. However, the record of trial was completed by mid-April 2001, a little over one month from the date the trial ended. The delay between this time and the CA's action (14 November 2001) is simply unreasonable. Finally, the Supplemental Staff Judge Advocate's Recommendation of 2 November

2001 does allude to the problem of missing Article 32 exhibits and the amended convening order, however, the delay in retrieving these documents and constructing a complete record cannot be held against the appellant. Based upon these circumstances and our review of this stage in the post-trial process, we conclude that the delay weighs against the Government.

As to the second critical period, 127 days elapsed between the CA's action and docketing the case with this Court. This delay is unreasonable on its face and there is no explanation for why it took so long just to mail the record. The "[d]elays involving this essentially clerical task have been categorized as 'the least defensible of all' post-trial delays." *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). This period of delay also weighs against the Government.

The last stage of post-trial delay involves the 810 days between docketing (21 March 2001) and this court's original decision (19 July 2005). During this time period, the appellant's Brief was filed, after two enlargements of time, on 23 September 2002. The Government then requested and was granted five enlargements of time, ultimately filing its Answer on 1 May 2003 - almost eight months after appellant's Brief was filed. The appellant then filed motions with the CAAF and this court requesting expedited review, however, no relief was granted. This court then took more than 26 months to issue its initial opinion.

The five enlargements by the Government that delayed the appellant's case for almost eight months are inexcusable. Although we recognize the case loads of appellate counsel, especially during this time period, our granting those enlargement requests was a failure of this court's duty of institutional vigilance. We will not hold this delay against the appellant. *See United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) (holding that an appellant will not be held responsible for the lack of institutional vigilance administered by a service court of criminal appeals); *see also Moreno*, 63 M.J. at 137 (stating that appellate counsel caseloads are "management and administrative priorities . . . subject to the administrative control of the Government.").

Finally, it took approximately two years from completion of briefing until a final decision was entered by this Court. Analysis of this time period places the court in the precarious position of reviewing its own delay. Suffice to say, the court is aware of the "flexible review of this period" by our superior court, *Moreno*, 63 M.J. at 137, and the autonomy that is necessary for this court to adequately conduct its Article 66(c) responsibilities. However, taking more than two years to issue the opinion in this case was unreasonable. Based upon all the circumstances noted above, we conclude that the delay incurred during the three stages analyzed here weighs heavily against the Government.

3. Assertion of the right to timely review & appeal

There is an abundance of evidence in this record supporting the fact that appellant has asserted his right to a timely post-trial review of his case on numerous occasions. These assertions were made prior to completion of the CA's action through this court's final decision. Accordingly, the Government was on notice throughout the post-trial stages of this case that the appellant was concerned about timely review. This prong weighs against the Government.

4. Prejudice

As to the fourth factor, the appellant asserts that the delay in post-trial review has prejudiced him in four ways: (1) the delay rendered him ineligible for parole consideration; (2) the delay caused him to register as a sex offender long before his appeal was decided; (3) the delay and resulting passage of time have eroded his professional skills as a Naval Officer; and (4) the delay has subjected him to the "revolving-door-counsel" problem because the appellant will soon be assigned his fourth military appellate counsel. Because we conclude that the appellant's second assertion - registering as a sex offender - has merit, we need not analyze the remaining assertions of prejudice.

The appellant has submitted evidence to this court that upon receiving his initial conviction for possession of child pornography charged under Article 134, UCMJ, he was registered as a sex offender in the states of Washington and Pennsylvania. See Motion to Attach of 16 Jan 2007. After his conviction was set aside in our initial decision, the appellant was taken off the sex offender lists in both states. *Id.* However, due to the delay in processing his appeal, we conclude that the appellant suffered actual prejudice by living with the stigma of the child pornography conviction and appearing on the sex offender lists in two states. See *Moreno*, 63 M.J. at 140 ("We find that [being on a sex offender registry] constitutes constitutional anxiety that is distinguishable from the normal anxiety experienced by prisoners awaiting appeal and that as a result *Moreno* has suffered some degree of prejudice.").

After weighing the four *Barker* factors, we conclude that the appellant has suffered a *Barker-type* post-trial due process violation. Having determined constitutional error in this case, we must now subject this error to a harmless error analysis in order to determine what, if any, relief is required. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). The burden now shifts to the Government to demonstrate that the error was harmless beyond a reasonable doubt. *United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006). "[T]he Government may rely on the record as a whole to establish that the error was harmless beyond a reasonable doubt." *United States v. Adams*, 65 M.J. 552, 562 (N.M.Ct.Crim.App. 2006). In determining whether

the error is harmless, we are required to apply a totality of circumstances test considering all the relevant facts before us *de novo*. *Id.* (citing *Toohy*, 63 M.J. at 363).

Here, we consider the many factors detailed above that weigh in favor of the appellant. We particularly note the numerous periods of unexplained post-trial delay where the Government bears responsibility. This delay culminated in a reversal of the appellant's conviction of possessing child pornography well-over four years after his trial was completed. Had a decision in this case been reached earlier, the appellant would have been spared the continued public disgrace that assuredly resulted from his appearance on the sex offender lists of two states. Accordingly, we cannot conclude that the due process error in this case was harmless beyond a reasonable doubt. Relief, however, is not automatic. We must determine whether meaningful relief is available for this due process violation.

Relief

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 caused. *See Rodriguez-Rivera*, 63 M.J. at 372. We have considered the totality of the circumstances and the types of relief that may be appropriate here, taking into consideration that a prior panel of this court set aside the findings of guilty to the charge and specification that resulted in the appellant having to register as a sex offender, thus removing him from the sex offender lists. We have also considered the fact that there will not be a rehearing on that charge and specification. Because the appellant has served his full term of confinement, reduction of the confinement or confinement credits would afford him no meaningful relief unless it had a significant impact upon collected forfeitures. *Id.* Accordingly, we will disapprove all confinement in this case as the only meaningful and proportionate relief available under the circumstances.

Conclusion

Accordingly, we affirm the findings of guilt to the Charge and the sole Specification thereunder. We affirm only so much of the approved sentence that extends to a dismissal.

Senior Judge ROLPH and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court