

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

**BEFORE**

**D.O. VOLLENWEIDER**

**E.E. GEISER**

**V.S. COUCH**

**UNITED STATES**

**v.**

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

NMCCA 200101562

Decided 29 March 2007

Sentence adjudged 13 January 2000. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Station Roosevelt Roads, Puerto Rico.

LT JAMES E. GOLLADAY, JAGC, USN, Appellate Defense Counsel  
LCDR JASON A. LIEN, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Senior Judge VOLLENWEIDER:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of theft of military ammunition, unlawful entry into government space with intent to commit larceny, and obstruction of justice, in violation of Articles 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 930, and 934. He was sentenced to confinement for twelve months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, pursuant to a pretrial agreement, suspended confinement over eleven months from the date the sentence was adjudged.

On 8 October 2004, this Court upheld the findings and sentence in the appellant's case. The Court in so doing found that the appellant was not prejudiced by his civilian defense counsel's improper argument or by post-trial delay in the processing of his case.

On 29 April 2005, the Court of Appeals for the Armed Forces remanded the improper argument issue<sup>1</sup> in light of *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004). That Court remanded as well the post-trial delay issue<sup>2</sup> for us to address the delay encountered between the end of trial and the convening authority's action.

We have reviewed the remanded issues, the appellant's brief on remand, the Government's response, and the entire record of trial. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantive rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Ineffective Assistance of Counsel**

The appellant claims that his defense counsel was ineffective because on sentencing counsel argued, without making a record of the appellant's discharge desires, that "I respectfully recommend a term of confinement for Matos-Pacheco for eight to ten months, any discharge that may be adjudged by you, protecting from any forfeitures or fines, and to be reduced to E-1, sir." Record of Trial at 618. Although under the circumstances of this case counsel's argument regarding discharge was improper, the appellant was not prejudiced thereby, and we decline to grant relief.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Constitutional standard applies to military cases. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). The Supreme Court explained the two components as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a

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<sup>1</sup> "WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT APPELLANT WAS NOT PREJUDICED BY HIS DEFENSE COUNSEL'S DEFICIENT PERFORMANCE WHERE HIS COUNSEL RECOMMENDED A PUNITIVE DISCHARGE AND STRUCTURED HIS CLOSING ARGUMENT TO AVOID FORFEITURES IGNORANT OF THE FACT THAT APPELLANT WOULD BE IN A NON-PAY STATUS DURING HIS CONFINEMENT BECAUSE HE WAS PAST HIS END OF ACTIVE OBLIGATED SERVICE."

<sup>2</sup> "WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO TIMELY REVIEW WHEN IT TOOK 561 DAYS FOR THE CONVENING AUTHORITY'S ACTION."

defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.

*Strickland*, 466 U.S. at 687. In *Quick*, the Court of Appeals for the Armed Forces stated that "the appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result." 59 M.J. at 386-87. Applying the *Quick* standard to the facts of the case *sub judice*, we find no reasonable probability that, absent the error in argument, there would have been a different result.

The appellant's pleas, his admissions during the providence inquiry, and the stipulation of facts entered into evidence reveal an extremely serious series of related crimes. The appellant was assigned to the Security Department at Naval Station Roosevelt Roads, Puerto Rico. Knowing that his superior petty officer had military ammunition stored in his office, the appellant went to the office spaces where he worked in the Alarm Control Center, bringing along his two daughters, one of whom was only nine years old. Using his two daughters to distract a petty officer who was in the office area, he took a pair of scissors and pried open the door of his superior petty officer's office. That petty officer had secured for the day. Having broken into the office, the appellant stole two military ammunition cans: one containing 1,000 9mm rounds and one containing 840 5.56mm rounds. He walked out with the ammunition through his own office area, where he knew he would not be observed by security cameras.

Later, the appellant was interviewed by the Naval Criminal Investigative Service (NCIS) about the theft. He lied to the NCIS agents, and made a false sworn statement. He invited the NCIS agents to search his house. First, however, he went to his house, made his daughters go to a neighbor's house, and convinced his neighbor to secret the stolen ammunition in the neighbor's house. This prevented the NCIS agents from finding the stolen ammunition during their search of the appellant's house. Ten of his fellow security force members had their homes and cars searched due to the appellant's thievery and obstruction of justice. His neighbor's young children had to be interviewed by NCIS special agents.

Eventually, four days after the theft, the NCIS agents recovered some of the stolen ammunition from the neighbor. However, 250 9mm rounds and 240 5.56mm rounds were missing. While the appellant testified that he stole the ammunition for his personal use (target shooting), his personal gun was a 9mm. The appellant's personal use would not account for the missing 5.56mm rounds. In any event, the appellant did not testify that he actually used the stolen ammunition for target shooting - only that he stole it for that purpose. At trial, an NCIS special agent testified that the military ammunition the appellant stole fit the weapons of choice among drug cartels in Puerto Rico and

elsewhere. He further testified that the black market price for this type of 9mm ammunition was one to two dollars per round, and two dollars per round for the 5.56mm ammunition.

Given the nature of the appellant's crimes, there is no reasonable probability that there would have been a different result if defense counsel had not essentially conceded a punitive discharge. This conclusion is underscored by the fact that this was a trial by military judge alone. The record does not reveal that the military judge was perceptibly swayed by defense counsel's concessions. To the contrary, in the face of trial counsel's argument that the appellant be confined for two years, the military judge appears to have exercised independent judgment in determining an appropriate sentence. Under the facts of this case, we find it virtually inconceivable that the appellant would not have been awarded at least a bad-conduct discharge for this crimes, notwithstanding his generally average performance evaluations; his service awards; the testimony of his brother, his children's pediatrician, the chaplain and others; and the appellant's claims of how much he loved the Navy.

We conclude that the appellant was not prejudiced by any deficiency in representation at trial. Therefore, we hold that the appellant was not denied the effective assistance of counsel.

#### **Post-Trial Delay**

The appellant asserts that he was deprived of his constitutional right to timely appellate review when it took the convening authority 561 days to act on the findings and sentence in his case. We disagree.

The following chronology outlines the post-trial delay between sentencing and the convening authority's action on this six-volume, 636-page record of trial:

<b>Event</b>	<b>Date</b>	<b>Days Elapsed Between Events</b>	<b>Total Days Elapsed</b>
Sentence Adjudged	13 Jan 00	0	0
Post-trial Session <sup>3</sup>	28 Feb 00	47	47
Record Authenticated	4 May 00	64	111

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<sup>3</sup> The military judge convened a post-trial session pursuant to Article 39(a), UCMJ, to consider an amendment to the pretrial agreement proposed after it was discovered that the agreement's forfeiture protections were invalid because the appellant was past his end of active obligated service and thus in a no-pay status. The Government proposed, and the appellant accepted, an amendment to the pretrial agreement that would obligate the convening authority to suspend all confinement in excess of 11 months in exchange for the appellant's reaffirmation of the pretrial agreement.

Clemency Request	13 Jun 00	39	150
SJAR Completed	24 Jan 01	205	355
SJAR Response	20 Feb 01	27	382
CA's Action	26 Jul 01	157	539

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (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) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

The appellant's case involves a delay of 539 days from the date of sentencing to the date of the convening authority's action, approximately 18 months. We note that 428 days of this period were exclusively attributable to the convening authority and his staff judge advocate. As this case was tried prior to our superior court's decision in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the presumptions of unreasonable delay set forth in that case do not apply here, and we do not find the delay in this case so extreme as to give rise to a strong presumption of evidentiary prejudice. Nevertheless, we find that the delay in this case was facially unreasonable,<sup>4</sup> triggering a due process review. Accordingly, we must balance the delay against the other three factors.

The Government provides no explanation for the delay in this case. However, we note that this was a lengthy record and involved a post-trial session to amend the pretrial agreement, an uncommon issue that surely would have required careful scrutiny by the convening authority and his staff judge advocate. We find no evidence of, nor does the appellant allege, bad faith or gross negligence on the part of the Government. The appellant concedes that he did not assert his right to a speedy review during the time in which his case was pending action by the convening authority.

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<sup>4</sup> The Government concedes that the specified period of delay is "unacceptable" but asserts that the appellant's due process rights were not violated. Government's Answer of 31 May 2006 at 7.

The appellant asserts as prejudice that the convening authority's delay in acting on his case denied him the benefit of his amended pretrial agreement. Specifically, the appellant argues that the convening authority was obligated to suspend all confinement in excess of 11 months but could not possibly have done so since he acted 18 months after the sentence was adjudged. However, the appellant has presented us with no evidence that he actually served more confinement than his amended pretrial agreement required. In fact, we note that the agreement contains a provision approving the deferral of all confinement in excess of 11 months until the date of the convening authority's action. Appellate Exhibit XXXIII at 2-3. Allegations of specific prejudice, like any other assertion in a pleading submitted to a court, must be supported by facts in the record. The appellant is uniquely situated to know whether he spent too much time in the brig, yet has not said that he did in fact stay in the brig beyond the date mandated by his pretrial agreement. Government records are also available to show the appellant's actual dates of incarceration.

An unsupported claim of specific prejudice will not be considered by this court. "Counsel who practice before this court have an ethical obligation to ensure that their pleadings are factually accurate." *United States v. Morris*, 62 M.J. 688, 690 (N.M.Ct.Crim.App. 2006). An appellant must demonstrate prejudice when alleging that he did not receive the benefit of a pretrial agreement. *Id.* at 689-90. He has not done so here. To the contrary, we observe that in his original brief to this court, the appellant conceded that he could not demonstrate any prejudice resulting from the delay in this case. In light of these facts and our review of the record, we do not find any specific evidence of prejudice suffered by the appellant as a result of the delay in this case. Balancing the four factors, we conclude that there has been no violation of the appellant's due process right to timely review.

Even if we were to assume a violation of the appellant's right to timely review, we would decline to afford relief. We have considered the facts of the appellant's case and the types of relief that may be appropriate here, including the appellant's request that we set aside the adjudged bad-conduct discharge. *See Moreno*, 63 M.J. at 143. As the adjudged confinement has now been either served or remitted and the appellant was in a no-pay status at the time he was sentenced, and given the serious nature of each of his offenses, we find that any relief we could fashion in this case that would be actual and meaningful to the appellant would also be disproportionate to the possible harm generated from the delay. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). We find that setting aside the bad-conduct discharge would be an unwarranted and inappropriate windfall to the appellant.

We are also aware of our authority under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in

the absence of actual prejudice. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). The appellant's offenses were serious and he has raised no meritorious allegations of error. We further note that the appellant did not request suspension or disapproval of the bad-conduct discharge in his post-trial clemency request. He does not present on appeal any fact that was not known to the convening authority at the time of his action on the sentence. Accordingly, we conclude that the delay in this case does not affect the findings and sentence that "should be approved." Art. 66(c), UCMJ.

### **Conclusion**

The findings and the sentence, as approved by the convening authority, are affirmed

Judge STOLASZ and Judge COUCH concur

For the Court

R.H. TROIDL  
Clerk of Court