

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

**BEFORE**

**D.O. VOLLENWEIDER**

**R.E. VINCENT**

**V.S. COUCH**

**UNITED STATES**

**v.**

**Joshua J. ORZECOWSKI  
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200300711

Decided 30 January 2007

Sentence adjudged 8 July 2005. Military Judge: J.G. Meeks.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial  
convened by Commanding General, 1st Marine Division (Rein), Camp  
Pendleton, CA.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel  
Maj WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

On 28 November 2001, the appellant was convicted by a military judge sitting as a general court-martial, in accordance with his pleas, of disobeying a lawful order, operating a vehicle while drunk, involuntary manslaughter, and three specifications of aggravated assault, in violation of Articles 92, 111, 119, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 911, 919, and 928. A panel of officer members sentenced the petitioner to confinement for 15 years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority approved the adjudged sentence, but suspended all confinement in excess of 13 years.

On 18 January 2005, this court affirmed the petitioner's conviction, but set aside his sentence after finding that the Government had breached the pretrial agreement in the case. We authorized a sentence rehearing that comported with the pretrial agreement. *United States v. Orzechowski*, No. 200300711, 2005 CCA LEXIS 12 (N.M.Ct.Crim.App. 18 Jan 2005). Pursuant to our decision, after rehearing by a military judge alone, the petitioner was sentenced on 8 July 2005 to confinement for 10

years, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a 5 February 2006 addendum to the original pretrial agreement, the convening authority approved the new sentence as adjudged, but suspended all confinement in excess of 8 years. The case was docketed with this court on 5 July 2006.

On 19 July 2006, the appellant filed a Petition for an Extraordinary Writ in the Nature of a Writ of Habeas Corpus, alleging an *ex post facto* application of good conduct time credit that illegally increased his time in confinement. We granted his petition and ordered the appellant's immediate release from confinement. *United States v. Orzechowski*, \_\_ M.J.\_\_, No. 200300711, 2006 CCA LEXIS 307 (N.M.Ct.Crim.App. Order 15 Nov 2006).<sup>1</sup> The appellant was released on 13 September 2006.

After considering the record of trial, the appellant's four assignments of error, and the Government's response, we conclude that the sentence must be modified. We find that the findings and the sentence as modified are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

In his present assignment of errors, the appellant requests that this court address those issues raised but not decided in his original appeal.<sup>2</sup> In light of our earlier decision to set aside his sentence and the subsequent rehearing, we conclude that the appellant's earlier assignments of error - - all related to his first sentencing hearing - - are moot.

The appellant now asserts that he was denied speedy post-trial review of his court-martial because 1,669 days elapsed between the adjournment of his first trial and docketing of the record of trial for his second appeal. Of specific note, 187 days elapsed between the rehearing on sentence and the staff judge advocate's recommendation, and 150 days elapsed between the convening authority's action and docketing.

Our superior court has provided a clear framework for analyzing such post-trial delay, utilizing the four factors established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (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); *see United*

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<sup>1</sup> This order was originally issued on 21 September 2006, and re-released for publication on 15 November 2006.

<sup>2</sup> Three issues were decided in our earlier opinion. The remaining issues are: (1) the military judge improperly allowed presentation of evidence, questioning of witnesses and argument by Government counsel that was inflammatory and unduly prejudicial; (2) the military judge erred to the material prejudice of the substantial rights of the appellant by refusing to admit into evidence the unsworn statement of the appellant that included the federal sentencing guidelines; and, (3) the sentence is inappropriately severe. *United States v. Orzechowski*, No. 200300711, 2005 CCA LEXIS 12, at n.1 (N.M.Ct.Crim.App. 18 Jan 2005).

*States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004). These four factors are balanced, with "no single factor [being] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey (Toohey II)*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 136). The absence of any one factor does not bar finding a due process violation. *Moreno*, 63 M.J. at 136.

The appellant claims that the post-trial delay analysis of this case begins with the conclusion of his first trial. We disagree. The appellant successfully appealed his initial sentence, and ultimately succeeded in reducing his adjudged confinement by three years. Assuming, without deciding, that any delay between the convening authority's action and docketing with this court after the first trial constituted a denial of due process to the appellant, we conclude that no relief for that period is warranted because the appellant has not shown prejudice. Considering the totality of the circumstances, we conclude that any delay after the first trial was harmless beyond a reasonable doubt.<sup>3</sup> *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006).

The post-trial delay related to the rehearing is, however, unreasonable on its face. The record of trial for the rehearing is 153 pages long, and is not overly complex. In an unsigned declaration from a Major Emerich, the Government avers that exhibits from the record of trial for the rehearing were misplaced, thus apparently explaining the 187 days it took to prepare the SJAR.<sup>4</sup> The unsigned declaration also claims confusion within the Camp Pendleton review office resulted in a 150-day delay in mailing the case to this court. Government Answer of 31 Aug 2006, Appendix A. The Government concedes, and we agree, that this factor weighs in favor of the appellant. *Id.* at 5.

The appellant made a timely demand for speedy review of his case on 4 May 2006, in the form of a motion to dismiss the charges and specifications on the grounds that his due process right to timely appellate review had been violated. This factor weighs in favor of the appellant.

After a careful review of the record of trial, we find actual prejudice in this case. The appellant served an additional 45 days in confinement due to the miscalculation of his "good time" credit, which was the basis for his petition for an extraordinary writ. But for the delay of 337 days it took to

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<sup>3</sup> We also note that the appellant's civilian appellate defense counsel received three enlargements of time to file a brief and assignments of error, and was granted oral argument, during the appellant's first appeal with this court.

<sup>4</sup> In that the declaration is unsigned, it is of no evidentiary value and we decline to rely on it.

docket this case after the rehearing on his sentence, the appellant would have been able to bring his petition for an extraordinary writ long before he served any excess confinement. This is clearly prejudice suffered by the appellant as a result of the delays in post-trial processing of this case and, in light of his meritorious issue on appeal, renders his additional incarceration oppressive. *Moreno*, 63 M.J. at 139. This factor weighs heavily in favor of the appellant.

Balancing all factors, we find a due process violation resulting from post-trial delay after the rehearing has occurred, resulting in significant prejudice to the appellant. We find that reducing the appellant's punitive discharge is appropriate relief.

Accordingly, we affirm the findings and only so much of the sentence as provides for confinement for 10 years, reduction to pay grade E-1, and a bad-conduct discharge.

Senior Judge VOLLENWEIDER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court