

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.F. FELTHAM, D.E. O'TOOLE, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**SAUL P. NUNEZ  
BUILDER CONSTRUCTIONMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 200700087  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 13 March 2001.

**Military Judge:** CDR Robert Wities, JAGC, USN.

**Convening Authority:** Commander, THIRTY-FIRST Naval  
Construction Regiment, Port Hueneme, CA.

**Staff Judge Advocate's Recommendation:** LT O.R. Lopez, JAGC,  
USN.

**For Appellant:** LCDR Matthew Schelp, JAGC, USN.

**For Appellee:** CDR K.M. Gibbs, JAGC, USN; LT J.E. Dunlap,  
JAGC, USN; Capt Geoffrey Shows, USMC.

**20 March 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

VINCENT, Judge:

On 13 March 2001, a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, violating a lawful general order, and wrongful use of marijuana, in violation of Articles 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 912(a). The appellant was sentenced to confinement for 42 days, forfeiture of \$600.00 pay per month for one month, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of time served for six months from the date of trial.

The appellant's sole assignment of error alleges excessive post-trial delay.<sup>1</sup> We have reviewed the appellant's initial brief and brief in response to the specified issues and the Government's responses, and have concluded the post-trial delay in this case violated the appellant's due process rights. However, following our corrective action, we conclude that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a) and 66(c), UCMJ.

### Post-Trial Delay

Our superior court has provided a clear framework for analyzing 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 States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004)). 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. Each factor is weighed and balanced to determine if it favors the appellant or the Government, with no single factor being dispositive. *Moreno*, 63 M.J. at 136.

As the appellant's case was tried prior to the date our superior court decided *Moreno*, the presumptions of unreasonable delay that apply to post-trial processing by this court do not apply here. Nevertheless, we find that the 2,200-day delay between trial and docketing with this court for a 62-page record of trial is facially unreasonable, triggering a due process

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<sup>1</sup> On 27 July 2007, we specified the following two issues:

I. WHETHER THE APPELLANT WAS PREJUDICED WHEN THE CONVENING AUTHORITY FAILED TO CONSIDER APPELLANT'S 17 OCTOBER 2001 CLEMENCY REQUEST IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 1107(B)(3)(A)(iii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

II. WHETHER THE APPELLANT WAS PREJUDICED WHEN THE STAFF JUDGE ADVOCATE FAILED TO STATE WHETHER CORRECTIVE ACTION SHOULD BE TAKEN ON THE FINDINGS OR SENTENCE IN LIGHT OF THE LEGAL ERROR RAISED BY THE APPELLANT IN HIS 18 OCTOBER 2006 CLEMENCY REQUEST, IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 1106 (d)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Having reviewed the record and submissions of the parties, we have the considered the prejudicial effect of the error in the first specified issue as one of the court's three deciding factors and conclude, *infra*, that the due process violation was not harmless beyond a reasonable doubt.

We note a legal officer, vice a staff judge advocate, prepared the 16 October 2006 supplemental recommendation. The legal officer was not required to comment on the legal error raised by the appellant in his 18 October 2006 clemency request. See R.C.M. 1106(d)(4).

review. See *United States v. Young*, 64 M.J. 404, 408-09 (C.A.A.F. 2007).

In weighing the delay, we note that, after trial, the record of trial was authenticated on 25 May 2001, the appellant submitted a clemency request on 17 October 2001, and the original staff judge advocate's recommendation (SJAR) was prepared and served on the appellant's defense counsel on 1 November 2001. No further action was taken on the appellant's case until the appellant filed a second clemency request with the convening authority (CA) on 17 May 2006, over five years after trial. A supplemental recommendation was prepared by a legal officer on 16 October 2006 and the appellant filed another clemency request on 18 October 2006. The CA completed his action on 20 November 2006, a period of five years and eight months after trial and over six months after the appellant's 17 May 2006 clemency request. Accordingly, the first factor weighs heavily in favor of the appellant.

In addressing the second factor, "we look at the Government'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. We note that the Government does not provide any reason for the delay, either the initial five years or the additional six months to complete the CA's action after the appellant filed his 17 May 2006 clemency request, and, accordingly, we conclude that the second factor also weighs heavily against the Government.

Considering the third factor, there is no evidence that the appellant asserted his right to a timely appeal prior to his 17 May 2006 clemency request. Under the guidance of our superior court, we conclude that this factor weighs against the appellant, but, under the circumstances of this case, not heavily. *Id.* at 138; *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006).

We evaluate the fourth factor, prejudice to the appellant, in light of three interests: "(1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and, (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *United States v. Toohey (Toohey II)*, 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 138)(quoting *Rheurk v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir 1980)).

Based on our analysis of these interests, we conclude the appellant did not suffer oppressive incarceration or particularized anxiety, and suffered no impairment regarding his defenses or grounds for appeal. Nevertheless, we have found a

due process violation because "the delay in this case is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohy II*, 63 M.J. at 362; see also *United States v. Bredschneider*, 65 M.J. 739, 742 (N.M.Ct.Crim.App. 2007)(a 2,571 day post-trial delay for a 77-page record of trial violated the appellant's due process rights).

Having found constitutional error in this case, we must now determine if the error was harmless beyond a reasonable doubt in order to determine if relief is required. *Young*, 64 M.J. at 409. The Government has the burden to prove that "this error was harmless beyond reasonable doubt." *United States v. Gosser*, 64 M.J. 93, 99 (C.A.A.F. 2006)(quoting *United States v. Miller*, 47 M.J. 352, 359-60 (C.A.A.F. 1997)). We apply a *de novo* standard of review. *Young*, 64 M.J. at 409.

Considering the totality of the circumstances, we cannot conclude the error is harmless beyond a reasonable doubt. We find that the integrity and fairness of the military justice system is brought into question by the following factors: (1) the Government permitted an uncomplicated 62-page guilty plea record of trial in a special court-martial to languish for over five years, without any explanation, and only resumed post-trial processing after the appellant filed his 17 May 2006 clemency request; (2) after the appellant filed his clemency request, the Government took another five months to prepare the Supplemental Recommendation and six months to complete the CA's action;<sup>2</sup> and, (3) the Government's excessive post-trial processing delay prejudiced the appellant by depriving him the opportunity to have the CA review his 17 October 2001 clemency petition, which, according to the original SJAR of 1 November 2001, was once in the Government's possession, but is now lost.

In fashioning appropriate relief for the appellant, we are mindful that the appellant's offenses consisted of wrongful use of marijuana, violating an order by possessing drug paraphernalia (a pipe), and a one-day period of unauthorized absence. Additionally, the appellant's military record reflects a prior nonjudicial punishment for unauthorized absence. Prosecution Exhibits 3 and 4. However, we also recognize that when the Government faced a post-trial delay of over five years, it inexplicably failed to expedite processing. After carefully considering options for relief, we conclude that we must set aside the bad-conduct discharge.

We also consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ.

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<sup>2</sup> In *Moreno*, our superior court held that a presumption of unreasonable delay is applicable whenever a CA's action "is not taken within 120 days of the completion of trial." 63 M.J. at 142. We note the CA, in this case, took over 180 days to complete his action even after the appellant notified him of the five-year post-trial delay.

We have considered the post-trial delay in light of our superior court's guidance in *Toohy I*, 60 M.J. at 102, and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considered the factors explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). However, in view of our remedial action addressing the due process violation, we decline to grant additional relief under Article 66(c), UCMJ.

### **Conclusion**

Accordingly, the findings of guilty are affirmed. Only so much of the sentence as provides for confinement for 42 days, forfeiture of \$600.00 pay per month for one month, and reduction to pay grade E-1 is affirmed.

Senior Judge FELTHAM and Judge O'TOOLE concur.

For the Court

R.H. TROIDL  
Clerk of Court