

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

**Before  
L.T. BOOKER, E.C. PRICE, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**STEVEN W. EDWARDS  
MACHINIST'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200602314  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 22 February 2006.

**Military Judge:** CDR John Maksym, JAGC, USN.

**Convening Authority:** Commander, U.S. Naval Forces Marianas,  
Naval Base, Guam.

**Staff Judge Advocate's Recommendation:** LCDR K.E. Grunawalt,  
JAGC, USN (10 Aug 2006)(20 Nov 2006); CDR A.H. Henderson,  
JAGC, USN (4 May 2009).

**For Appellant:** LT Michael Torrisi, JAGC, USN.

**For Appellee:** Capt Mark Balfantz, USMC.

**21 December 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of carnal knowledge, sodomizing a child, and possessing child pornography, respectively violations of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. On 22 February 2006, the military judge announced a sentence of confinement for 15 years, a fine of \$10,000.00, reduction to pay

grade E-1, and a dishonorable discharge from the Naval Service. The convening authority (CA) disapproved the fine but approved the remainder of the sentence.

This is the fourth time that we have considered this case. The protracted history of post-trial and appellate processing is amply recounted in our opinion of 28 January 2010, and we will not re-state it here. We also incorporate by reference into this opinion those resolutions of assignments of error that were memorialized in the 28 January 2010 opinion.

The record is now ripe for our statutory review. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59 and 66, UCMJ. Since, however, the period of suspension of part of the adjudged confinement has run, we will modify the sentence in our decretal paragraph.

### **Discussion**

The most critical assignment of error at this point, and the one to which we will devote the majority of our attention, is the appellant's claim that his pleas are improvident because his dependents did not receive payments of pay and allowances that would otherwise have been forfeited by virtue of Article 58b, UCMJ. We find that the appellant did receive the benefit of his bargain and that his pleas were provident.

In our most recent opinion, we ordered the record returned to an appropriate CA to commission a limited hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to determine what payments were owed to the appellant's dependents, what payments were actually made and when, and whether any balance remained due. A military judge conducted that hearing on 23 March 2010 and attached her findings of fact and conclusions of law as Appellate Exhibit XXVIII to the record of the *DuBay* proceedings. The military judge's findings of fact are supported by the record and we adopt them as our own. We agree with her ultimate conclusion that the appellant's dependents have received at least as much money as they were entitled to under the terms of the pretrial agreement between the appellant and the CA.

We agree with the appellant that the post-trial processing of payments has been erratic and imprecise. The appellant withdrew his argument that timeliness of payments was a material

term of the pretrial agreement and requested that we not consider the issue. Based upon the record before us, moreover, we conclude that the appellant failed to sustain his burden of establishing either that timeliness of payment of any deferred or waived automatic forfeitures was material to his decision to plead guilty or that the Government failed to comply with the terms of the pretrial agreement. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006). To the contrary, we conclude that the Government has fulfilled its obligations under the pretrial agreement with respect to deferment and waiver of automatic forfeitures and that there is no substantial basis in law or fact to overturn his guilty plea. See *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

In addition, the appellant's assertion that this court's decision setting aside the initial CA's action which effected the Government's obligations under the pretrial agreement now entitles his dependents to additional money is neither persuasive nor relevant to the providence of his plea or our authority and responsibility under Articles 59(a) and 66(c), UCMJ. See *United States v. Shelton*, 53 M.J. 387, 391 (C.A.A.F. 2000). Cf. *Liggan v. United States*, 52 Fed. Cl. 395, 399 (2002) (emphasizing that a lawful sentence set aside for procedural error and then reimposed does not give rise to a claim for restoration of status under Article 75, UCMJ). In cases with a protracted appellate history, such as the one before us, to hold otherwise -- using, for example, the CA's most recent action as the tolling event for end of deferment and commencement of waiver -- would call into question the parties' understanding with respect to the terms of the agreement. Cf. *Shelton*, 53 M.J. at 391.

We turn our attention now, but briefly, to the issue of post-trial delay alleged by the appellant in his filings of October 2008 and August 2009. This is not a case that has languished due to inattention; instead, it is a case that has been plagued by post-trial legal error, and the majority of the delays in this case are directly attributable to the need to correct the post-trial errors. We are unprepared to state that "the aggregate delay in this case appears facially unreasonable," *Toohy v. United States*, 60 M.J. 100, 103 (C.A.A.F. 2004). Our determination might be different if the appellant had produced evidence of spite, rather than misapplication and misunderstanding of the rules, as the motivating force behind the delay. We therefore need not conduct a "full due process analysis." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). Any such analysis that we did

conduct would take into account the fact that the appellant has not alleged that his pleas to these serious offenses are without a factual basis, or that his sentence is inappropriately severe, or that some prejudicial error occurred at trial, for example. We have further considered our authority to grant relief under Article 66 and decline to do so. *See United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

We have considered the remaining assignments of error not previously considered by this court, and we find them to be without merit. We specifically reject the appellant's argument that the current CA's action has been infected by error from previous processing. Indeed, our review of the most recent staff judge advocate's recommendation and the defense counsel's response to it assures us that the CA considered only those matters that properly and lawfully inform his highly discretionary action on the sentence. The appellant would have us assume that use of the phrase "clemency requests" in the action means that the CA considered impermissible matter -- references in earlier documents to a dismissed nonjudicial punishment allegation -- contrary to the order of this court. We decline to make such an assumption of error. We also note, conversely, that the appellant did make multiple requests for clemency (that his sentence be reduced, and that he be released in summer 2009) in the submission from his defense counsel in June 2009. While a better practice may have been to specify by date the actual documents that the CA considered, we cannot find on the record before us that the appellant has met his burden to demonstrate error.

### **Conclusion**

As noted above, the passage of time has now rendered obsolete that portion of the pretrial agreement that requires suspension of a portion of confinement "for one year from the date of trial". AE XII ¶ 2. We could order the Government to demonstrate that the appellant has not had his suspension vacated as contemplated by that paragraph, but in the interest of judicial economy and in the interest of providing some finality to the parties, we will take action in our decretal paragraph.

The findings are affirmed. Only so much of the sentence as extends to confinement for 10 years, reduction to pay grade E-1, and a dishonorable discharge from the U.S. Navy is affirmed.

For the Court

R.H. TROIDL  
Clerk of Court